Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT M. KURTZ,

Petitioner,

v.

ROBERT AYERS, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES O1-S3

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APPENDIX O

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT M. KURTZ, Petitioner, vs. ROBERT AYERS, Warden and CAL TERHUNE, Director of California Department of Corrections, Respondent.	Case NO. CV F 97-6201 AWI SMS P MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION OF AUGUST 8, 2001 [28 U.S.C. § 636] U.S. Magistrate Judge Sandra M. Snyder

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OBJECTION #1

THE MAGISTRATE JUDGE'S DISPOSITION FOR GROUND #1 OF THE FEDERAL PETITION IS INCORRECT

GROUND #1: PREJUDICIAL VIOLATION OF PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO DUE PROCESS (FIFTH AMENDMENT) DUE TO TRIAL COUNSEL SMITH'S WANTON MISMANAGEMENT OF INFORMATION COVERED BY THE ATTORNEY/CLIENT PRIVILEGE (ACP)

A.

THE MAGISTRATE JUDGE INCORRECTLY CONCLUDE THAT A SIGNIFICANT AND UNAUTHORIZED BREACH OF THE ACP BY A DEFENSE ATTORNEY IS NOT "PRIMA FACIE EVIDENCE OF UNREASONABLE OR INCOMPETENT ASSISTANCE OF COUNSEL"

The Magistrate Judge begins her analysis of the attorney/client privilege (ACP) violations based on Grounds #1, #2, and #3 of the Petitioner's Second Amended Federal Petition with this observation:

> Petitioner alleges that Trial Counsel violated the attorney-client privilege and thus violated the Sixth Amendment right to counsel. However, while a violation of attorney-client privilege, if proven, may be a violation of ethical canons, it is not prima facie evidence of unreasonable or incompetent assistance of counsel. [footnote 5]
>
> 5. Petitioner does not cite, nor can this Court find any statement of law which holds, that counsel has an affirmative duty to inform his client of the protections of attorney/client privilege before seeking consent to disclose the privileged information.

(R&R of 8/8/01, p. 13(7-11).)

Actually, there are cases whose holdings are directly on point:

> It is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, he creates a chilling

> effect which inhibits the mutual trust and independence necessary to effective representation.

(*United States ex re. Wilcox v. Johnson* (3rd Cir. 1977) 555 F.2d 115, 122; *Lowrey v. Cardwell* (9th Cir. 1978) 575 F.2d 727, 730-732.) Moreover, the Magistrate Judge's reasoning is inconsistent with one of the central teachings of *Strickland v. Washington* (1984) 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052. In that case the Supreme Court held that ineffective assistance of counsel was defined as conduct unreasonable under "prevailing professional norms". (*Id.* 466 U.S. 688.) "[P]revailing professional norms" are the very "ethical canons" which the Magistrate Judge insists can be violated without giving rise to any adverse inference. Again, from *Strickland* we have:

> When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.[ ] More specific guidelines are not appropriate. The Sixth amendment refers simply to "counsel", not specifying particular requirements of effective assistance. *It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.*" (emphasis added)

(*Strickland v. Washington*, supra, 466 U.S. at 687-688.) The interplay of "ethical canons" and the analysis of an attorney's effectiveness is well illustrated in *Jones v. Barnes* (1983) 463 U.S. 745, 752-753 [notes 5 to 6 and related text], 77 L.Ed.2d 987, 103 S.Ct. 3308.

1.

THE LEGISLATIVE AND ETHICAL STANDARDS AT ISSUE IN GROUNDS #1 TO #3 OF THE FEDERAL PETITION

Under California Business and Professions Code section 6068(e), trial counsel had a duty to "maintain inviolate the confidence, and at every peril to himself . . . to preserve the secrets, of his or her client." The American Bar Association's (ABA) Ethical Cannon 4 provides: "A lawyer should preserve the confidences and secrets of a client". The ABA's Ethical Consideration EC4-4 provides in pertinent part: "A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." (See Exhibit #1 to these Objections.) A well known and respected treatise on California Criminal Practice describes the proper procedure to follow in the initial client interview:

> Perhaps the most important objective of the initial interview Is to establish the proper attorney-client relationship. The Attorney must strive to develop a climate of trust by explaining The attorney-client privilege, pointing out that a successful outcome Requires that the attorney know all the facts, and conducting The interview in a manner that inspires confidence and trust.
>
> [ ] However, the attorney must make it clear that the or she is in charge of the defense and of trial tactics and strategy, while emphasizing that the client will be kept fully informed as the case proceeds.

(emphasis added)

(LexisNexis, *California Criminal Defense Practice,* §1.13(2)(b), p. 1-36.11.) (See Exhibit #2 to these Objections.) Additionally, referring to California Evidence Code sections 953 to 955, trial counsel would have learned that control of the ACP is vested in the client – not the attorney. "A lawyer who . . . received . . . a communication that is subject to the lawyer/client privilege has a duty to claim the privilege whenever he . . . is present when the communication is sought to be disclosed, unless the holder of the privilege no longer exists *or instructs the lawyer otherwise.*" (emphasis added) (Jefferson's *California Evidence Benchbook* (3rd. Ed. 1997) §40.7.) Evidence Code section 955 makes it *mandatory* for the lawyer to claim the privilege for the client whenever the lawyer is present at a court proceeding in which the disclosure is sought. *Id.* at §40.23.) Waiver of the disclosure of privileged information occurs "if any *holder* of the privilege . . . has *consented* to such disclosure." (Evid C §912(a).) "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure. . . ." *(Ibid.)* In short, an *express waiver* must be obtained by the lawyer from his client. (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 [the attorney, unless instructed otherwise, must make the claim].) Also very instructive on this issue is ABA Compendium of Professional Responsibility Rules and Standards, *Model Rules of Prof. Conduct* (1998) §1.6, which provides in pertinent part:

> (a) A lawyer *shall* not reveal information relating to representation of a client unless the client consents *after consultation*, except for disclosures that are impliedly authorized in order to carry out the representation, ... (emphasis added)

(See Exhibit #3 to these Objections.)

An attorney is not defined in the above-cited statutes as a holder of his client's privilege. Thus, he must seek his client's consent to make a disclosure. Informed by Evidence Code sections 953, 954, and 955, an attorney must understand that attorney/client confidences are the inalienable property of his client. They do not fall within the purview of the attorney's tactical or strategic fiat. Properly chastened by, Business and Professions Code section 6068(e), any competent attorney would be extraordinarily scrupulous about securing the express and fully informed consent of his client before making any disclosure. To do otherwise in any substantial way is not only gravely unethical, it is unlawful. (B & P C §6068(e); 1 Witkin, *California Procedure Attorneys* (4th Ed. 1996) §§315-321 [breach of the obligation may give rise to a malpractice claim].)

Thus, contrary to the Magistrate Judge's assertion, a violation of the attorney/client privilege is prima facie evidence of unreasonable *and* incompetent assistance of counsel – that is, unless the Court is saying that a violation of explicit, mandatory statutory law and their supporting professional standards may be competently and reasonably undertaken.

2.

GIVEN THE PURPOSE OF THE PRIVILEGE, A LAWYER WHO MAKES SIGNIFICANT DISCLOSURES OF ACP MATERIAL WITHOUT THE DUE CONSULTATION AND CONSENT FROM HIS CLIENT IS PRESUMPTIVELY INCOMPETENT

The attorney/client privilege (ACP) is not some furbelow on the attorney/client relationship. The United States

Supreme Court has described the privilege as indispensable to the formation and preservation of what is considered an attorney/client relationship in America:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and *that such advice or advocacy depends upon the lawyer's being fully informed by the client.* As we stated last term . . . : 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation *if the professional mission is to be carried out*'. . . . [W]e recognize the purpose of the privilege to be 'to encourage clients to make full disclosure to their attorneys.' This rationale for the privilege . . . . ' is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, *which assistance can be safely and readily availed of when free from the consequences or the apprehension of disclosure.*" (emphasis added)

(*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389, 66 L.Ed.2d 584, 101 S.Ct. 677.)

In *United States v. Zolin* (1989) 491 U.S. 554, 562, 105 L.Ed.2d 469, 109 S.Ct. 2619 the United States Supreme Court emphasized "the *centrality* of open client and attorney communication to the proper functioning of our adversary

system of justice". (emphasis added) "[P]rivacy of communication with counsel" has also been described as "the essence of the Sixth Amendment right." (*United States v. Rosner* (2nd Cir. 1973) 485 F.2d 1213, 1224 cert denied 417 U.S. 950.)

In *Weatherford v. Bursey* (1977) 429 U.S. 545, 554, fn. 4, 51 L.Ed.2d 30, 97 S.Ct. 837, the High Court noted with approval that the U.S. Attorney General had twice conceded that "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented *only* if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government . . . .". (emphasis added)

In *Fisher v. United States* (1976) 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569, the High Court put it bluntly: "[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."

Thus it would be the height of incompetence for an attorney to openly flout the attorney/client privilege. Any competent attorney would recognize, as the United States Supreme Court most definitively does, that such behavior, quite beyond being malpractice, would hazard the total – and justified – estrangement of his client.

By saying that a significant breach of the attorney/client privilege is "not prima facie evidence of unreasonable or incompetent assistance of counsel", the Magistrate Judge is steering the law into unchartered waters. An

attorney is intended to function as an assistant whose interests are transparently aligned with those of his client:

> From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause *and the more particular duties to consult with the defendant on important decisions . . . .*" (emphasis added)

(*Strickland*, supra, at 466 U.S. 688.)

> Counsel's actions are usually based, quite properly, *on informed strategic choices made by the defendant and on information supplied by the defendant.* (emphasis added)

(*Id.* at 466 U.S. 691.)

The need for the consultation regarding proposed disclosures of attorney/client privilege – as well as the scope of that privilege – is obvious: "A layman may not be aware of the precise scope, the nuances, and the boundaries of [a testimonial privilege]." (*Maness v. Meyers* (1975) 419 U.S. 449, 466, 42 L.Ed.2d 574, 95 S.Ct. 584.)

In light of the relevant U.S. Supreme Court authority, statutes, and ethical canons, to suggest that an attorney may spontaneously toss about crucial and vitally incriminating client confidences without so much as a 'by-your-leave' is utterly indefensible. It suggests that an attorney can thumb his nose at the law, treat his client as a mere object to which he unilaterally applies his professional judgment – a sort of idiot whose confidence is utterly dispensable – and proceed utterly heedless of the defendant's Fifth Amendment rights, all because he is the "attorney of record". How can it *not* be deemed terribly incompetent and thoroughly unreasonable for an attorney

to ignore the theoretical underpinnings of an effective attorney/client relationship, as defined by the U.S. Supreme Court and relevant law? *Consequently an open, significant, and unexplained violation of the privilege is prima facie evidence of ineffective assistance of counsel.* It can be nothing else. Such an offense is far more grave than the failure to investigate or to call a witness. It does not strike at the root of effective assistance of counsel, it fully uproots the relationship. It is the difference between one who drives against traffic on the freeway and one who, though driving in the right direction, neglects to signal a lane change. The former is out of his mind, the latter has just failed to perform his duty perfectly. The former is betraying the most fundamental rule of the road, the latter may be just absent minded.

B.

PETITIONER WAS PREJUDICED BY THE TESTIMONY ELICTED BY TRIAL COUNSEL FROM JERRY HAMILTON REGARDING THE PRIVILEGED COMMUNICATIONS OF JANUARY 12, 1993

The Magistrate Judge assumes "without finding" that Trial Counsel was incompetent in eliciting testimony from Jerry Hamilton regarding the statements mad by Petitioner to his attorney on January 12, 1993. (See R&R, p. 18(24-25), p. 19(19-20).) However, the Magistrate Judge insists that Petitioner was not prejudiced by this presumptive incompetence. (*Ibid.*) The Magistrate Judge arrives at this conclusion by pointing out that Petitioner's story about having "found Susan dead in the garage from apparent suicide" would still have come out through the

testimony of other witnesses, specifically, Petitioner's mother and Reed Harris. (See R&R, p. 19(25-28).)

The Magistrate Judge mistakes the claim. Petitioner's prejudice theory revolves around the fact that the jury learned through Jerry Hamilton – and Jerry Hamilton alone – that Petitioner had lied *to his own attorney*, that is, by relating the false suicide/rafters story that Petitioner had also used to explain Susan's death to Kathy Hamilton and Reed Harris. The best way to understand Petitioner's theory of prejudice is to start with the defense attorney's cross-examination of Jerry Hamilton and to follow the relevant events through to their logical conclusion in the prosecutor's closing argument.

1.

TRIAL COUNSEL'S ERRORS DURING HIS CROSS-EXAMINATION OF JERRY HAMILTON AT THE PRELIMINARY HEARING

Prior to Attorney Smith's cross-examination of Mr. Hamilton at the preliminary hearing, all that Hamilton had said about Petitioner's statements about his wife's fate was that Petitioner had told him prior to the attorney meeting of January 12, 1993, that Susan was dead. (See CT of 2/16/93 at CT 15(16-20).) It was during cross-examination by Petitioner's attorney that facts were elicited from Hamilton that Petitioner had told his attorney that his wife had committed suicide. (See CT 21(22)-22(25).) Obviously, this was a privileged communication – and the Magistrate Judge does not say otherwise. But, the truly consequential fact, is that the information was elicited by Petitioner's attorney and not the prosecutor.

2.

TRIAL COUNSEL'S EXAMINATION OF JERRY HAMILTON AT TRIAL AND THE RAMIFICATIONS THEREOF

Unfortunately, Attorney Smith's penchant for revealing his client's secrets had not run its course before trial. When Jerry Hamilton testified during trial, Smith again led the charge to question him about his recollection concerning the attorney/client conference of January 12, 1993. (See RT 123(22)-125(3).) In light of the apparent waiver of the privilege, the prosecutor *on redirect* elicited that Petitioner had told Smith where the body was and that Susan had committed suicide. (RT 133(18)-134(7).) Later in the trial Hamilton was recalled to the stand and Smith expanded the scope of the privileged facts divulged to the jury. Under Smith's questioning, Mr. Hamilton testified that Petitioner "may have" told Smith that he found Susan hanging from the rafters in the garage and that Petitioner did tell Smith that he found Susan on the floor beneath the rafters. (RT 445(3-11).)

The disclosure of this scenario in no way helped Petitioner. (See, e.g., testimony of George Marsh, at RT 317(22)-318(11) [Susan's father's testimony that the story of Susan committing suicide was ludicrous].)

The coroner conclusively ruled out death by hanging. (RT 345, 422-423.) Also, there was testimony about the dust on the garage rafters being undisturbed. (RT 432-433.) Petitioner's own testimony was likewise inconsistent with the suicide/rafters story. (RT 724-748.)

The brunt of this series of unprofessional errors began to be felt by Petitioner during his testimony in the defense case. Trial counsel knew that his client had abandoned the

suicide/rafters explanation for his wife's death. Nonetheless, he had allowed the jury to learn that Petitioner had told him the suicide/rafters story at the outset of the attorney/client relationship. This created a rhetorical problem. Before he could have his client tell the truth, he first had to explain how and why his client had abandoned the false suicide/rafters story. The upshot of these considerations was that, barely a minute into the direct examination, *Attorney Smith had Petitioner admit that he had lied to Smith.* (RT 684(12-13).) Later, in the direct, Smith asked Petitioner to tell the jury *why* he had lied to Smith. (RT 778(9-12).)

Predictably, during closing argument, the prosecutor leveraged the windfall of privileged information that he had been handed into a stunning attack on the bonafides of Petitioner's testimony:

> Well, come February at the preliminary hearing, he learns different. This isn't a suicide, it is not a hanging. The physical evidence is incompatible with his second lie so he has had six months to think about his third one and you have heard it here, Friday and yesterday. The way he has craftily lied throughout this case reminds me of the saying I generally don't quote, but there is a saying that says, 'Oh, what a tangled web we weave, when we practice to deceive'. That quote was made hundreds of years ago, I believe, but you'd think that the author had this man in (

(RT 902(25)-903(8).)

Later in his summation the prosecutor remarked that Petitioner had lied to everyone, even "to his own attorney. . . . But now he would have you believe that he's telling the truth. He is not. He's lying to you." (RT 944(22-26).)

Doubtless, the jury saw Petitioner's inability to tell his own lawyer how Susan had died as the ultimate proof that Petitioner's story of accidental and unintentional homicide was bogus.

Petitioner had testified that his wife died on January 4, 1993 as a result of an unpremeditated fight between the two of them. (RT 700-778.) There were no other witnesses to the crime presented. The prosecutor's case consisted primarily of evidence suggesting a consciousness of guilt, and thereby, presumably, of premeditated and deliberate murder, that could be gleaned from Petitioner's statements and conduct between January 4, 1993 and January 12, 1993. Defense counsel Smith correctly observed on more than one occasion that "virtually 75 percent of [the prosecutor's] case has been on the issue of [Petitioner's] dishonesty". (RT 540(6-8); see also RT 927(156), 937(24)-938(4).)

Petitioner testified that his wife's death was unintended and unpremeditated. (RT 778-779, 783(23-24), 784(8-13), 800(7-12).) A reasonable person considering Petitioner's story of accidental death in light of Petitioner's "lies" to his attorney would be likely to conclude that Petitioner's lies to his attorney were evidence that Petitioner had in fact premeditated the crime. It is far easier to write off Petitioner's lies to friends and family, (see, e.g., prosecutor's cross of Petitioner at RT 787-831), as no more than evidence that Petitioner could not cope with facing them and telling them the level of responsibility he had in Susan's death, than it is to believe such an explanation when it comes to his lies to his attorney. If it was accidental, albeit at his own hands, why not tell his own attorney? Withholding the unsavory truth from relatives is under-

standable, but to withhold exculpatory "truth" from one's own advocate, is another matter entirely.

The prosecutor saw Petitioner's lies to his own attorney as the *coup de grace* for Petitioner's credibility. He argued as much to the jury. (RT 944-945.) He had a point.

3.

FURTHER RAMIFICATIONS OF TRIAL COUNSEL'S INCOMPETENCE: THE NEED TO EXPLAIN WHEN, HOW, AND WHY PETITIONER CHANGED HIS STORY

Like a chain of dominoes falling, each additional privileged communication led to the elicitation of another, until the entire course of Petitioner's relationship to his counsel had, willy-nilly, been exposed.

Since Attorney Smith had (without conceivable professional justification) allowed the jury to learn that Petitioner had told him the same story he had fobbed off on the police and public, Smith was drawn, nearly inexorably, to expose the circumstances under which Petitioner had first come forward with the story he ultimately told the jury. Immediately after Smith had Petitioner admit to the jury (for the second time) that he had lied to Smith at the January 12, 1993 conference, Petitioner was asked by Smith to describe what caused him "to admit that [he was] responsible for her death after months of lying?" (RT 779(10-11).) Smith knew that this question would elicit privileged material. Petitioner explained the circumstances of the admission at trial in this way:

> A. [By Petitioner]: ". . . . the final straw [in admitting I was responsible came] in that meeting that we had together, you [i.e., Smith] had

indicated to me that given the facts in this case and what I had said . . . . wasn't very plausible.

Q. At that meeting, did you tell me what happened?

A. No.

Q. When did – how long after that meeting did you come to me?

A. The next day.

(RT 779(20)-780(2).)

Smith then led Petitioner through a series of questions establishing that Petitioner had never admitted his responsibility for Susan's death prior to the January 12, 1993 Attorney/client conference. (RT 780.) The prosecutor on cross-examination made predictable use of the scope of Smith's ever widening waiver of his client's privilege in his devastating passage:

Q. You met with your attorney and he told you that if you maintained this story of suicide, you were going to go down on first degree murder. And he told you to think about that and you did, and now we have this story you've related here in court.

Mr. Smith: Again, Your Honor, object, misstating the testimony of the witnesses.

The Court: Sustained.

Mr. Kams: Q. Did your attorney sit down with you and tell you that your story of suicide wasn't going to wash?

A. Not in those words.

Q. In – in words to the effect?

A. Yes.

Q. And he told you to think about it?

A. No.

Q. Well, it was at some point after that discussion, was it not, that this story surfaced about this struggle in the house?

A. That's correct.

(RT 786(7-25).)

Later, the prosecutor savaged Petitioner's credibility with these questions:

Q. When you did tell Mr. Smith, you told him that she had committed suicide?

A. That's correct.

Q. And it wasn't until he sat you down and said that that wasn't going to wash that your story changed?

Mr. Smith: Your Honor, I am going to object to the form of question. I think it's misleading the evidence.

The Court: Sustained. Rephrase.

Mr. Kams: Q. When you met Mr. Smith, you didn't tell him that you had had this struggle and she accidentally was killed?

A. No.

Q. In fact, you told him about this suicide. When you talked to him about the suicide, did you say she was hanging from the rafters?

A. I don't recall.

Q. You don't recall what you told your lawyer when you first met him and told him about your wife's death?

A. No.

(RT 814(7-25).)

However, the prosecutor was not finished exploiting the advantages offered by the scope of Smith's direct:

Q. Isn't it a fact that – strike that. At the preliminary hearing, back in February, you heard the testimony of Doctor Gopal regarding the medical evidence in this case?

A. Yes, I did.

Q. And you heard him say at that time that this was not a hanging, not a suicide. Do you recall that?

A. Yes.

Q. And isn't it true it was after that point in time that you decided to say that, yes, you were involved in her death but it was this accidental killing?

A. It might have been after that, yes.

(RT 828(23)-829(8).)

Strangely enough on direct, Smith seemed only to be concerned about rehabilitating *himself* and set about using Petitioner to do so – without the slightest concern for Petitioner's privilege:

Q. Now, a question was asked in words to the effect that after some point in time when

you – you changed your story, that you were talking to your lawyer and, uh, that your lawyer suggested that you had to change your story in some way.

A. That is not true.

Q. And did I ever, from the time I first was contacted by you, did I ever ask you whether you were guilty of this crime?

A. No, which kind of surprised me.

Q. And did I ever in – in the month of July, let you know that the story you had given me was not matching up with the evidence and the facts?

A. You had indicated that to me indirectly.

Q. Okay. And was it in such a way to cause you to believe – cause you to believe that I did not believe your story?

A. I considered that as a possibility, yes.

Q. And did I ever tell you what your story should be or tell you anything that you would suggest you should lie to this Court and jury?

A. Never.

(RT 843(14)-844(9).)

That it was Smith's concern for his own reputation – and not for the light in which his client would be viewed that provoked these questions – is made clear by remarks Smith made in his summation. (See RT 924(20) – 926(2) [Smith expresses umbrage at the prosecutor's imputation that he wold coach Petitioner to lie and points to

Petitioner's testimony (as referenced in the quoted material above) as proof that he did not].)

The jury never should have heard "word one" of what transpired between Smith and Petitioner on January 12, 1993. If they had not, Petitioner would not have been left floundering in an attempt to explain why he changed his story. The jury should never have learned that Petitioner's own lawyer indirectly intimated to Petitioner that his story did not wash. Such an opinion, was itself manifestly privileged. (See *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345 [the attorney/client privilege includes a lawyer's uncommunicated impressions and conclusions concerning the case].)

Smith's efforts did no more than vindicate himself in the eyes of the police and the prosecutor from the imputation that he had suborned Petitioner's trial testimony. (See RT 941(26)-942(6) [prosecutor apologizes to Smith for insinuating that he would coach a witness].) Shot to rags by the tag-team questioning of Petitioner by Smith and the prosecutor, was even the remotest possibility that the jury would perceive Petitioner as having been motivated by a spirit of honesty (and the advice of others to tell the truth) to make the admissions that he made at trial.

Smith's conduct with respect to Petitioner's privilege was an unmitigated fiasco for the defense. There is a reasonable likelihood that the impact of Smith's unethical and incompetent conduct as described above affected the outcome of the case. (See *Strickland v. Washington*, supra, 466 U.S. 694.)

C.

THE MAGISTRATE JUDGE IRRELEVANTLY RAISES THE DOCTRINE OF WAIVER IN RELATION TO PETITIONER'S TESTIMONY EXPLAINING WHY HE LIED TO HIS ATTORNEY AND WHY HE DECIDED TO TELL THE TRUTH

The Magistrate Judge remarks:

> Petitioner is correct that the substance of these statements [i.e., "about the circumstances leading up to his testimony at trial"] were privileged communications. However, by testifying about these statements Petitioner tacitly, if not expressly consented to waive the privilege. It was Petitioner's right and decision to take the stand, and he makes no allegations of coercion concerning this choice.

(R&R, p. 20(14-18).)

This observation is not on point. The issue presented is whether counsel's questioning on the topic fell below prevailing professional norms – not the legal ramifications of Petitioner's answers. Assuming arguendo that waiver occurred, it assuredly arose from trial counsel's incompetence and must therefore be "seen as an external factor [to the defendant], i.e., imputed to the State." *(Coleman v. Thompson* 1991) 501 U.S. 722, 754, 115 L.Ed.2d 640, 111 S.Ct. 2546.)

Moreover, Petitioner's sworn assertions to the effect that trial counsel never counseled him regarding the ACP and that all of counsel's actions in disclosing ACP material were unexpected thrusts, precludes any determination that the disclosures were knowing waivers of the privilege. (See ABA Ethical Consideration 4, California Criminal

Defense Practice, §1.13(2)(b), ABA Rule 1.6, Exhibits #1, #2, and #3, respectively, to these Objections.) Nor, for the same reason, were they voluntary. What exactly was Petitioner supposed to do when trial counsel started to pry into privileged matters while Petitioner was testifying, assert the privilege in front of the jury? The circumstances were inherently coercive. Petitioner's conduct does not amount to waiver. (Cf. *United States v. Mezzanatto* (1995) 513 U.S. 196, 205, 210-211, 130 L.Ed.2d 697, 115 S.Ct. 797 [in context of FRE Rule 410, waiver must be knowing and voluntary]; Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (3rd Ed. 1998, Lexis Press) §§26.2d, fn. 26, 33, 34, 39 [discussing preconditions to waiver]; see also Exh. #1 to P & A in support of Second Amended Federal Petition [Petitioner's declaration re he did not understand the precise nature and scope of the privilege].)

D.

THE MAGISTRATE JUDGE ERRONEOUSLY FRAMES TRIAL COUNSEL'S ELICITATION OF ACP MATERIAL FROM PETITIONER AS A TACTICAL CHOICE WORTHY OF DEFERENCE

Petitioner has already established that it is not within the purview of a defense attorney's strategic and tactical function to unilaterally disclose his client's confidences. (See supra, pp. 1-21.) Thus, the Magistrate Judge's analysis of whether there was any conceivable benefit of counsel's "unorthodox" (R&R, p. 21(8-12)) defense miscarries. It is no more relevant to speculate as to what possessed counsel to exhibit all of his client's dirty laundry than it would be to try to understand why a bank robber needed

the money. The controlling point is that both of them are thieves, having no right to what they seized.

While largely irrelevant, it is nonetheless illuminating to consider for a moment the tactical explanation that the Magistrate Judge posits. She suggests that "Trial Counsel put all of the lies on the table to lend credibility to this 'clean breast' theory", i.e., the idea that Petitioner was suffering from Post Traumatic Stress Disorder (PTSD) and could not face the truth about his conduct until his condition improved. (R&R, p. 21(3-8).) This idea has nothing to recommend it. If it had been trial counsel's plan to weave these disclosures into a PTSD defense, why did he not weave them into his examination of Dr. Hamm? (See RT 529-544, 552-557, 559-561.) Why is there not a single line in trial counsel's closing argument that proposes to draw the Magistrate Judge's inference from petitioner's lies to counsel? (See RT 904-941.) However, the most devastating rebuttal to the Magistrate's Argument is the historical record. Petitioner's explanation of how he came to tell the truth was not consistent with a PTSD defense. He responded to Smith's inquiries by saying that "the final straw" [in admitting his responsibility] came when Smith indicated that what Petitioner "had said .... wasn't very plausible". (RT 779(20)-780(2).) As noted the prosecutor took hold of this club and beat the PTSD defense to smithereens. (See RT 786(7-25), 814(7-25), 828(23)-829(8); quoted, supra, pp. 9-21.) Petitioner's declaration in support of the petition establishes that counsel did not alert petitioner to this line of questioning before Petitioner took the stand. (See Exh. #1 to P & A in support of Second Amended Federal Petition.) Obviously, counsel would have done better to ask these sort of open-ended 'why' questions

of his client privately before he let them fly in the courtroom. Any reasonable attorney, having heard Petitioner's scrupulously honest answers, would have just as scrupulously avoided the subject in open court.

E.

WHEREIN PETITIONER CONCEDES TWO POINTS MADE BY THE MAGISTRATE JUDGE

Petitioner intentionally does not object to the Magistrate Judge's finding that the ACP did not cover his statements to his mother and stepfather on the night of January 11, 1993. (See R&R, pp. 15(4)-16(18).)

Petitioner does not object to the Magistrate Judge finding that the Sixth Amendment did not attach until after the morning consultation of January 12, 1993 between Petitioner and his trial attorney. (See R&R, p. 16-17.)

CONCLUSION

The Magistrate Judge posits that full disclosure of the history of Petitioner's deceitfulness, including chapters of that history which were privileged, supported the PTSD defense. (See R&R, pp. 20(19)-21(21).) However, this line of defense was clearly not dependent on information within the ambit of the ACP. The defense expert was able to form and articulate his opinion without any reference to the attorney/client disclosures. (See RT529-561 [testimony of Dr. Hamm].) Moreover, in its most persuasive form, this defense would have rested solely on Petitioner's pre-arrest, non-privileged, behavior. There was no need to expose *the pragmatic* considerations rooted in trial counsel's advice

that triggered, by Petitioner's candid admission, the decision to abandon the suicide pretense. (See RT 779-780, 786, 814, 828-829, 843-844.) Introducing the jury to the fact that Petitioner reversed his field because – as the prosecutor so deftly put it – his story "wasn't going to wash" (RT 786(15-16)), and the concomitant revelation that neither contrition nor a free-standing desire for atonement were the crucial factors leading to abandonment of the suicide story, could only have provoked skepticism and anger in the jury's deliberations. Petitioner's pragmatic considerations do not fit in the PTSD defense.

Thus, the Magistrate Judge is incorrect in reasoning that Petitioner's lies to his attorney and his sudden decision to abandon the suicide story were facts that supported the defense theory. In fact, they were inconsistent with it. The prosecutor saw that clearly. He pounded away at the obvious inferences, both through his cross of Petitioner and in closing argument. The only use that defense counsel made of the privileged material that he divulged was in the context of a rear-guard action that became necessary because the whole matter detracted from his credibility as well. The jury may well have thought, as the prosecutor twice insinuated, that trial counsel's conduct in prodding his client to abandon the suicide story – no matter how neutrally it was phrased – was tantamount to the solicitation of perjury. (See RT 786(7-25), 814(7-25), 828(23), 829(8); see also 843(14)-844(9), 924(20)-926(2) [Smith responds to imputation that he intended to prod his client into fashioning a more plausible story].)

The Magistrate Judge herself calls these disclosures "unorthodox" – that is an understatement. (R&R, p. 21(8-12).) One can search in vain for a parallel in decisional

law. Not only did counsel go beyond his lawful prerogative in exposing these secrets without due consultation with his client, but he provided the prosecutor a moral bully-pulpit from which to deride Petitioner's testimony of death by accident.

Thus trial counsel's conduct resulted in structural trial error and prejudice must be presumed. (See *United States v. Cronic* (1984) 466 U.S. 648, 654, fn. 11, 80 L.Ed.2d 657, 104 S.Ct. 2039 [describing the circumstances of a constructive denial of counsel when the performance of trial counsel is so inadequate that, [in effect, no assistance of counsel is provided].) An interesting case with a similar performance by its trial counsel [in relation to Petitioner's trial counsel] is *Rickman v. Bell* (6th Cir. 1997) 131 F.3d 1150, cert den. 523 U.S. 1132. In that case the Sixth District Court of Appeals overturned a death penalty conviction on the grounds of ineffective assistance of counsel, holding that prejudice had to be presumed because of trial counsel's "outrageous" performance. The *Rickman* Court commented:

> We find it simply incredible that the most damaging images of Rickman *came from his own attorney*. . . . All of these outrageous tactics were introduced by [trial counsel] himself.
>
> [Trial counsel's] behavior cannot be characterized as *legitimate trial strategy*; no rational individual could think that painting a picture of one's client even more frightening than the prosecution could paint, would do anything other than doom his client.
>
> [What the lower court permitted to occur] was nothing less than the evisceration of the right-to-counsel that is guaranteed by the Sixth

> Amendment and as much a travesty for our entire judicial system as it is for Rickman individually. The display of Rickman's trial, if allowed to stand, would simply *mock fundamental constitutional guarantees of "vital importance"*. . . . [The Supreme Court's] recognition that "the right to counsel is the right to the *effective* assistance of counsel, . . . would be devoid of meaning were counsel like [trial counsel] deemed effective. (emphasis added)

(*Id.* at 1159-1160.) In Petitioner's case, trial counsel painted him as a worse liar than the prosecution. The fact that Petitioner had lied to his family *and his own attorney* was brought out by trial counsel *himself,* just as in *Rickman.* This cannot be characterized as legitimate trial strategy. Affirming Petitioner's conviction would mock the sanctity of the attorney/client privilege and the Sixth Amendment right to the *effective* assistance of, counsel. Prejudice must be presumed. Petitioner's conviction cannot stand.

In any event, even if this Court does not presume prejudice, there is prejudice a plenty. As the California Court of Appeal explained, Petitioner's credibility was the 'lynch pin' of the prosecution's case. (See Respondent's Answer, Exh. #5, pp. 11-13 [CCOA's opinion].) Trial counsel's offering of testimony that Petitioner had lied to his family *and his own attorney* about the circumstances of Susan's death was the "most damaging images" of the Petitioner's credibility that were brought out at trial. (See *Rickman*, supra, at 1159.) Hence either way one looks at it, under the *Cronic* standard of presumed prejudice or under the *Strickland* standard, Petitioner was denied his Sixth amendment right to the *effective* assistance of counsel.

Petitioner's conviction should be vacated.

OBJECTION #2

THE MAGISTRATE'S DISPOSITION OF GROUND #2 IS INCORRECT

GROUND #2: TRIAL COUNSEL'S UNPROFESSIONAL HANDLING OF CLIENT CONFIDENCES FRUSTRATED THE FORMATION OF A MEANINGFUL ATTORNEY/CLIENT RELATIONSHIP BY CAUSING PETITIONER TO BE LESS THAN CANDID WITH HIM IN SUBSEQUENT MEETINGS. THIS VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AS CRUCIAL INFORMATION RELATED TO GUILT, INNOCENCE, AND PUNISHMENT WAS WITHHELD FROM SMITH AND ULTIMATELY THE JURY

A.

THE MAGISTRATE JUDGE ERRONEOUSLY CONCLUDES THAT "THE CLAIM FAILS BECAUSE THE COURT HAS FOUND NO VIOLATION OF THE ATTORNEY/CLIENT PRIVILEGE"

The Magistrate Judge reasons:

> Insofar as this claim rises or falls upon Petitioner's prior arguments that there has been a violation of the attorney-client privilege, this claim fails because the Court has found no violation of the attorney-client privilege.

(R&R, p. 22(9-12).)

The Magistrate Judge astutely observed that the Sixth Amendment right does not attach until after the commencement of adversarial proceedings. (See R&R, p. 16-17.) Petitioner concedes the point. Yet, Petitioner has not conceded the issue of whether counsel's disclosure of the location of the body violated the attorney/client

privilege. The latter issue remains important because it is well settled that the effectiveness of counsel can be compromised by counsel's conduct *before* the attorney/client relationship is formed. (E.g., *Lockhart v. Terhune* (9th Cir.2001) 250 F.3d 1223, 1226-1228 [Attorney Hove's appointment to represent a third-party potentially liable for crimes for which Lockhart was later arrested for, found to the basis of a conflict of interest]; *Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 578-581, cert. den. 488 U.S. 908 [counsel rendered unfit re conflict via a commercial transaction that occurred between the two prior to the commencement of the attorney/client relationship and the adversarial proceeding]; *People v. Clark* (1993) 5 Cal.4th 950, 1001 [conflict arises from prior representation of prosecution witness]; *In re Darr* (1983) 143 Cal.App.3d 500, 511-514 [same]; *United States v. Washington* (9th Cir. 1986) 797 F.2d 1461, 1464-1467 [if defense attorney had previously had access to defendant's files as an employee of the Justice Department then conflict would exist barring future representation of defendant]; *United States v. Sites* (9th Cir. 1995) 56 F.3d 1020, 1025, cert. den. 516 U.S. 1138 [counsel is disqualified from successively representing defendants with conflicting interests]; *United States v. Ziegenhagen* (7th Cir. 1989) 890 F.2d 937, 940-941, affirmed 907 F.2d 152 [defense counsel previously appeared against defendant at state sentencing hearing 20 years earlier – subsequent representation of defendant improper]).

These authorities amply demonstrate that an attorney's conduct before the commencement of adversarial proceedings can render him unfit to represent a given defendant.

B.

THE MAGISTRATE JUDGE SPURIOUSLY AND IMPROPERLY CONCLUDES THAT PETITIONER WAIVED HIS ACP WITH RESPECT TO THE LOCATION OF SUSAN'S BODY

The Magistrate Judge reasons that counsel was neither unethical nor unreasonable in disclosing the location of the body because he "presented [Petitioner] with the opportunity to say 'no' ". (See R&R, p. 17(19-27).) Petitioner has several responses.

First, California Evidence Code section 912(a) says that waiver of the attorney/client privilege requires a holder's consent. Petitioner's declaration states that he did not give his consent. (Exh. #1, para 8-16 in P & A in support of Second Amended Federal Petition; see also Ground #2, point 5 of Second Amended Federal Petition.) Jerry Hamilton's declaration is only to the effect that Trial Counsel was on the phone with the police, that he cupped his hand to the receiver, and said "should we tell them?" – and that he did not hear any response from Petitioner. (See Exh. #2, pp. 2-4, in P & A in support of Second Amended Federal Petition.) Thus, there is no evidence of consent before the Court, quite the opposite. Essentially, the Magistrate Judge is reaching a conclusion contrary to the uncontradicted evidence before the Court. This is an unreasonable shortcircuiting of the process. An evidentiary hearing is required if the Court wishes to go beyond the facts stated in the exhibits to the petition. (See *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1027.)

Second, this was a momentous occasion in the attorney/client relationship. The Court, as should have been true of Trial Counsel before it, must approach this issue

with greater sensitivity to the ramifications of trial counsel's rash and unilateral action. On the facts stated in the declarations, trial counsel was utterly flippant in this matter. On the same facts, his startlingly precipitous disclosure struck his client as a betrayal. How would the Court judge a divorce attorney in conference with a client who gets the client's spouse on the phone and discloses, in the same flippant manner, the existence of an affair and the location of hidden assets? How would any of us feel about a banker who receives our deposit and then tucks some of the money received into his or her lapel pocket – or for that matter tosses the money into the air? This claim cannot be defeated by the doctrine of waiver. Truly, the issue of waiver is spurious to the claim. The focus should be on counsel's conduct. Was it within prevailing professional norms? Is that a proper way to have a client waive his ACP in such a momentous matter? Consider the Fifth Amendment ramifications. This was a mortally inculpatory move. Would any reasonable person, on the facts sworn and before the court, ever think the same way about sharing information with their lawyer again? Of course not. That is the fundamental point.

Third, on two separate occasions during the trial, Smith had witnesses describe to the jury the nature of the phone calls that he had with the police on the morning of January 12, 1993, (See RT 493-494 [Schiotis]; RT 123-125 [J. Hamilton].) Smith also elicited testimony from Mr. Hamilton on the subject during the preliminary hearing. (See CT 23-24.) The telling factor to be noted in each of these passages is that Smith did not attempt to elicit testimony from either of these witnesses that Petitioner had *wanted* Smith to reveal the location of Susan's body to the police, or that Petitioner had in any way *consented* to

the release of this information. (See RT 124(25)-125(3), 493(22)-494(6).)

Presumably Trial Counsel, that is, if he believed it to be true, would have elicited from Mr. Hamilton, Petitioner, or Det. Schiotis when any or all of them testified, that Petitioner had either wanted to make this disclosure or had consented to it. As it was, that is, in the version the jury heard, the virtue of candor was vested in Smith and *not Petitioner.* There is no conceivable tactical justification for keeping from the jury evidence that Petitioner cooperated with the most crucial aspect of the police investigation. This would have supported the "clean breast" theory of the defense. (See & R, p. 21(6-7).) Thus, we must conclude that Smith's conduct supports an inference that Petitioner never gave his consent.

C.

THE MAGISTRATE JUDGE'S APPLICATION OF THE 'INEVITABLE DISCOVERY DOCTRINE' IS UNFOUNDED AND COUNTER TO THE UNDISPUTED EVIDENCE IN THE RECORD

The Magistrate Judge reasons thusly:

> Finally, Petitioner cannot and has not shown prejudice. Even if Trial Counsel had not disclosed the location of the body to the police, as the police were in the process of searching the house, and they would have found the body anyway.

(R&R, pp. 17(28)-18(2).)

Petitioner alleged facts, which were not disputed by Respondent, establishing that the police had essentially finished searching the house when they received the

second, and portentous, call from trial counsel. (See Memo of P&A in Support of Second Amended Federal Petition, pp. 13(26)-14(3) & fn. 6; see also Traverse, p. 32(9-19).)

Second, the burden is on the government to prove inevitable discovery by a preponderance of evidence. (*United States v. Media* (9th Cir. 1995) 69 F.3d 309, 319.) Having presented no evidence on the subject, merely argument, it has essentially, conceded the point.

The Magistrate Judge also argues that Petitioner had already "told his mother, stepfather, and AA sponsor Reed Harris that he knew his wife was dead". (R&R, p. 18(3-6).) "He told Reed Harris that he had hidden the body." (*Ibid.*) This argument actually goes nowhere. To the extent that the police did not discover the body when they searched the house, they would assume upon receipt of any information that Petitioner had hidden the body, that he had done so at some location *other than his house.*

D.

THE MAGISTRATE JUDGE ERRONEOUSLY EQUATES GROUND #2 WITH CASES IN WHICH A DEFENDANT HAD COMPETENT COUNSEL, JUST NOT A "MEANINGFUL RELATIONSHIP" THEREWITH

In the Magistrate Judge's words:

> The Sixth Amendment does not guarantee a "meaningful relationship" between an accused and his publicly appointed counsel, but merely a right to competent counsel. *Morris v. Slappy,* 461 U.S. 1, 14 (1983). . . . Petitioner is in error that he has a constitutional right to a relationship of trust and candor with his attorney, rather his

> constitutional right is to competent representation, consequently prejudice cannot be presumed.

(R&R, p. 22(14-24).)

Petitioner is talking in Ground #2 about willful and unethical conduct of an attorney which is inconsistent with the way society has intentionally *structured* the attorney/client relationship. When the United States Supreme Court disparaged the petitioner's position in *Morris v. Slappy* by famously declaring that a defendant is not entitled to a "meaningful relationship" with his attorney, the intent was to conjure up the idiomatic connotations of the phrase "meaningful relationship". As we all know, that phrase is often used to signify the sort of relationship that exists between lovers. The phrase from *Morris v. Slappy* is taken out of context if it is used literally. Because, a defendant is most certainly entitled to a *meaningful* relationship with his attorney, that is, one that is structurally sound, free of conflicting interests, and adequate to vindicate a defendant's legitimate rights and interests within our adversary system. "[T]he right to counsel is the right to the effective assistance of counsel." (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14, 90 S.Ct. 1441.)

If trial counsel acted without suitable consultation and consent from Petitioner in the matter of the disclosure of the location of the body, during the attorney/client conference of January 12, 1993, and by putting Petitioner 'on the spot' during his own testimony with questions that required Petitioner to divulge his attorney's advice and other ACP material, then trial counsel 'meaningfuly' crippled the attorney/client relationship – in ways that were utterly predictable. Predictable that is, for anyone

versed in the law of, and justification for, the attorney/client privilege. Presumably, that would include trial counsel.

Thus, the Magistrate Judge's observation miscarries. True, the Constitution does not command that clients will avail themselves of, and trust, the good faith of their attorneys. True, the Constitution is not violated when a defendant idiosyncratically fails to be candid with his attorney so long as the attorney has been faithful to his professional end of the bargain, the vagaries of a client's state of mind are completely his own affair. But what do these ideas have to do with the case at hand? The Magistrate Judge admits, in a classic understatement, that Attorney Smith's behavior was "unorthodox". (See R&R, p. 21(8-12).) It certainly was. When an attorney's unorthodox behavior hazards his client's trust, that conduct "must .... be imputed to the State". *(Coleman v. Thompson,* supra, 501 U.S. at 754.) An attorney's discretion does not extend to discretion to reveal as he sees fit his client's secrets. In such matters, there is only one way: the *orthodox* way, that is, to consult with the client and act on his fully informed decision. The most basic way that an attorney expresses his fidelity to his client, is in keeping the relationship in confidence. And, "[t]he duty of loyalty [is] perhaps the most basic of counsel's duties". (*Strickland v. Washington*, supra, 466 U.S. at 692.)

E.

GROUND #2 WARRANTS APPLICATION OF THE PER SE STANDARD OF REVERSAL ATTENDANT TO STRUCTURAL ERROR

The appropriateness of a per se standard of these facts is underscored by the Ninth Circuit's holding in *Frazer v. U.S.* (9th Cir. 1994) 18 F.3d 778, 780, 785. In *Frazer*, it was held that a section 2255 movant's allegation that he was coerced into agreeing to a bench trial on stipulated facts by counsel's threat to perform ineffectively at trial and by counsel's use of a racial slur, if proven at an evidentiary hearing, were deemed to require reversal on ineffective assistance of counsel grounds without inquiry into prejudice. The *Frazer* Court explained:

> Such behavior completely destroys and negates the channels of open communication needed for the relationship to function as contemplated in the Constitution.

(*Id.* at 785.)

In this matter, trial counsel essentially jumped track and took his relationship with Petitioner outside of the framework created by society to vindicate the Sixth Amendment. This is not Petitioner's fault. It is not Petitioner's fault that he reacted to trial counsel's irresponsible behavior as the framers of the attorney/client privilege would expect. (See Exh. #1, para 13-16, 18, 41, in P & A in support of Second Amended Federal Petition.) The withholding of vital information bearing on a client's defense is the law's expected consequence of acts in derogation of the attorney/client privilege. The Magistrate Judge's reasoning is contrary to a solid wall of authority and must be rejected.

It is impossible to apply harmless error analysis to the constitutional violation described in Ground #2. One cannot assess what a "hypothetical jury" might have done but for the error. One cannot discuss "what effect it had upon the guilty verdict in the case at hand". (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 124 L.Ed.2d 182, 113 S.Ct. 2078.) It is not a *trial error* that can be processed under *Brecht v. Abrahamson* standard. (See *Brecht v. Abrahamson* (1993) 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710). The ACP is central. . . . "to the proper functioning of our adversary system of justice". (*U.S. v. Zolin*, supra, at 491 U.S. 562.) Respect of the privilege is vital "if the professional mission is to be carried out." (*Upjohn v. U.S.*, supra, at 449 U.S. 389.) The "sound[ness] [of] legal advice . . . depends upon the lawyer being fully informed by the client". (*Ibid.*) "If the client knows that damaging information could more readily be obtained from the attorney. . . . [a] client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice". (*Fischer v. U.S.*, supra, at 425 U.S. 403.) The "Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented *only* if a criminal defendant knows that his communications with his attorney are private . . ." (*Weatherford v. Bursey*, supra, at 429 U.S. 554, fn. 4.) (emphasis added)

These decisions compel the application of a per pre standard of reversal of Ground #2. (See *United States v. Cronic*, supra, at 466 U.S. 654-659; *Rickman*, supra, at 131 F.3d 1159-1160.) In any event, if prejudice is required, there is a prejudice a plenty. (See *Conclusion* to Ground #1, supra, at pp. 21-24.)

OBJECTION #3

GROUND #3: ATTORNEY SMITH'S HANDLING OF PETITIONER'S PRIVILEGE INSTITUTED MALPRACTICE AND GAVE RISE TO A CONFLICT OF INTEREST WHICH VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

A.

TRIAL COUNSEL'S MISMANAGEMENT OF ATTORNEY/CLIENT PRIVILEGED MATERIAL DID CREATE AN ACTIONABLE CONFLICT OF INTEREST

The Magistrate Judge's ruling squarely conflicts with the holding in *United States ex re. Wilcox v. Johnson* (3rd Cir. 1977) 555 F.2d 115, 122:

> It is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, *he creates a chilling effect* which inhibits the mutual trust and independence necessary to effective representation. (emphasis added)

(See also *Lowrey v. Cardwell* (9th Cir. 1978) 575 F.2d 727, 730-732.)

The Magistrate Judge opines that "Petitioner has at most established a potential, conflict" (R&R, p. 25(12-13)) and has failed to make the concomitant showing "that counsel's actions were unreasonable and prejudicial to his defense." (*Id.*, p. 25(14-15).) dearly, the Third Circuit in *Wilcox* held that the "unnecessary discose[ures] of confidences of his client" creates a "chilling effect" between

attorney and client and thus in 'actual' – not a potential conflict, stating that by virtue of such action the attorney inhibits the mutual trust and independence necessary for effective representation. (*Id.* at 122; see also *Lowrey,* supra, at 575 F.2d 730-732; *Frazer,* surpa, at 18 F.3d 781-786; *Rickman,* supra, at 131 F.3d 1150, 1159-1160.) Thus, no particularized showing of unreasonable or prejudicial actions should be required.

Furthermore, the Magistrate Judge is incorrect in asserting that there was no manifestation of the conflict *during* the trial. Ground #2 of this federal petition describes the chilling effect that trial counsel's actions had upon the attorney/client relationship. Thus, trial counsel's malpractice was far more insidious than that described in *Lopez v. Sculley* (2d Cir. 1995) 58 F.3d 38, 41 and *United States v. Shorter* (7th Cir. 1995) 54 F.3d 1248, 1252-1253, cert. den. 516 U.S. 896, which the Magistrate Judge seeks to distinguish. (See R&R, pp. 24-25.) In both of those cases the parties and the court had an opportunity to confront the issue. Here, the corrosive and pernicious effects of the conflict were masked by trial counsel's failure to inform Petitioner of his rights. Grounds #1 and #2 are a sufficient showing of prejudice to justify reversal.

OBJECTION #4

GROUND 44: ATTORNEY SMITHS STANDING AS AN ADVOCATE FOR PETITIONER WAS COMPROMISED BY HIS RELATIONSHIP TO THE AGENCIES PROSECUTING PETITIONER AND THE EXTENT TO WHICH SMITH WAS BEHOLDEN TO THEM. THIS VIOLATED PETITIONER'S RIGHTS TO EFFECTIVE AND CONFLICT-FREE COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A.

TRIAL COUNSEL'S 'COZY' RELATIONSHIP TO THE PROSECUTION TEAM CONSTITUTED A CONFLICT OF INTEREST

Here the Magistrate Judge asserts that Petitioner has not proven that trial, counsel's "prior crimes put his interest in direct conflict with Petitioner in this case". (R&R, p. 27 (9-10).) Assuming, arguendo, that this proposition is true, the Magistrate Judge has still incorrectly adjudicated the claim. Petitioner's showing is adequate enough to justify a hearing. The Magistrate Judge concedes that trial counsel's handling of attorney/client privileged materials was "unorthodox". (R&R, p. 21(9-10).) Juxtaposing trial counsel's conduct and the irregularly 'cozy' relationship between trial counsel and the prosecuting agencies and their representatives, a reasonable explanation for said counsel's bizarre handling of Petitioner's attorney/client privilege (ACP) comes into focus. Why did counsel tell Detective Schiotis where the body of Susan Kurtz lay without appropriate consent and consultation with Petitioner? Why did counsel take such an interest in demonstrating before the judge and jury who heard this case that he was the good Samaritan that provided the crucial tip to the police? (See Memo of P&A in support of this Second Amended Federal Petition, p. 11-12.) Why was trial counsel at such pains to prove through Petitioner's testimony, and at significant cost to Petitioner's credibility, the role trial counsel had played in Petitioner's about-face concerning the circumstances of Susan's death? (*Id.*, pp. 22-26).) "Counsel may see in a criminal case an opportunity to further personal or general societal interests that are not those of the client." (See ABA Standard 4-3.5 for the Defense Function.) He may do

no more than "negotiate with a particular prosecutor". (*Ibid.*) However such motives and conduct give rise to a conflict of interest. (*Ibid.*)

Petitioner cannot offer direct proof of trial counsel's state of mind without having him on the stand and under oath. In this regard, it is important to note that neither Petitioner's investigator, nor the California Appellate Court were able to elicit from trial counsel any response to Petitioner's conflict of interest claim. As the Magistrate Judge noted, the California Court of Appeal requested a response to the allegations before this Court in the guise of Grounds #1 through #6 on three occasions. Trial Counsel did not even dignify its inquiries with notice of his intention not to respond. (See R&R, p. 2(19-22); Respondent's Answer, Exh. #3, pp. 26-26c & Appendix H.) The logical inference is that trial counsel recognizes that his conduct was unethical, unconstitutional, and indefensible. (See *People v. Romero* (1992) 113 C.R.2d 332, 337, 339, reversed on other grounds in *People Romero* (1994) 8 Cal. 4th 728 [counsel's failure to provide explanation for conduct gives rise to a presumption of "absence of a satisfactory explanation"]; *People v. Pope* (1979) 23 Cal.3d 412, 426; State Bar of California Formal Opinion No. 1992-127 [trial counsel has an ethical duty to explain conduct upon request from a former client even if to do so would admit ineffectiveness].)

In *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1020, our Ninth Circuit ordered a hearing on a conflict claim with no more to commend it than Ground #4. To deny Petitioner a hearing is to adopt a rule that favors exactly the sort of defense attorneys who are likely to have succumbed to a conflict, that is, those who neglect their ethical duty to provide an explanation. Attorney Smith, an alcoholic, who had an unusually cozy relationship with the

prosecuting agency and the personnel of that agency which were involved in this case, who was a former police officer and *the* Fresno County District Attorney, has stonewalled the investigation into the "unorthodox" behavior which is the basis of Ground #4 – a claim that he could have easily debunked, if he could have done so honestly, on any of the three occasions that the California Court of Appeal made inquiries of him. If all of this, in light of clear evidence of multiple "potential" conflicts does not justify an evidentiary hearing, Petitioner is stymied. To deny an evidentiary hearing in this case would be in derogation of *Townsend v. Sain* (1963) 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745. (See also *Schell v. Witek,* supra, at 218 F.3d 1027.)

It is well established that in circumstances where defense counsel is beholden to or 'cozy' with the prosecution team, such a relationship may constitute a conflict of interest. *(Burnside v. State* (Fla.App. 1995) 656 So.2d 241, 243-244; *State v. Johnson* (tah App. 1991) 823 P.2d 484, 486, 488-490; *United States v. Marin* (N.D. Ill. 1985) 630 F.Supp 64, 65-66; *Brewer v. State* (Tex.Cr.App. 1983) 649 S.W.2d 628, 630-632.)

Petitioner's conviction should be vacated.

OBJECTION #5

THERE IS A REASONABLE PROBABILITY THAT COUNSEL'S FAILURE TO EXPOSE THE STATE'S FALSE MOTIVE THEORY ALLOWED THE JURY TO INFER PREMEDITATION

GROUND #5: ATTORNEY SMITH WAS INEFFECTIVE FOR FAILING TO PRESENT OBVIOUS READILY AVAILABLE EVIDENCE NEGATING THE PEOPLE'S

MOTIVE THEORY. THIS VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

A.

THE MAGISTRATE JUDGE ERRONEOUSLY APPLIED THE HARSH JACKSON v. VIRGINIA STANDARD IN THE PREJUDICE ANALYSIS ON GROUNDS #5, #6, AND #7 – ALL OF WHICH ARE CLAIMS UNDER STRICKLAND v. WASHINGTON

The United States Supreme Court in *Schlup v. Delo* (1995) 513 U.S. 298, 330, 130 L.Ed.2d 808, 115 S.Ct. 851, ('*schlup*'), compared the "probabilistic" standard of review of *Murray v. Carrier* (1986) 476 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639. ('*Carrier*'), with the federal standard for sufficiency of evidence claims under *Jackson v. Virginia* (1979) 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, ('*Jackson*'). The Court's remarks are pertinent to this *Objection* because, the *Carrier* standard and the *Strickland* standard are both "probabilistic standards" – as the *Schlup* Court defined that term – while the *Jackson* standard is sui generis. As the *Schlup* Court explained:

> The *Jackson* standard, which focuses on whether any rational juror *could have* convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. . . . Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson,* the use of the word *could* focuses the inquiry on the power of the trier of fact to reach its conclusion. Under *Carrier,* the use of

> the word *"would"* focuses the inquiry on the likely behavior of the trier of fact.
>
> Indeed, our adoption of the phrase 'more likely than not' reflects this distinction. Under *Jackson,* the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier,* in contrast, the habeas court must consider what reasonable triers of fact *are likely to do.* Under this *probabilistic* inquiry, it makes sense to have a *probabilistic* standard such as 'more likely than not'.
>
> The 'clear and convincing' standard adopted in *Sawyer* reflects this same understanding. Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of Petitioner's claim, that is not true under *Carrier.*

(*Schlup,* supra, at 513 U.S. 330, fn. 49, 130 L.Ed.2d 838.) (emphasis added)

Thus, if a Court conducts prejudice analysis for a federal claim that is governed by a "probabilistic standard" in terms of whether, despite the claimed error, the jury *could* still have convicted, that Court is engaged in the wrong inquiry. *Strickland v. Washington* sets a "probabilistic standard" for ineffective counsel claims, that is, one that focuses on what reasonable jurors *would* do – not what reasonable jurors *could* do. From *Strickland* we have:

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

> The defendant must show that there is a reasonable *probability* that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different. A reasonable *probability* is a *probability* sufficient to undermine confidence in the outcome.

(*Strickland,* supra, at 466 U.S. 694.) (emphasis added)

Excerpts drawn from the Magistrate Judge's Report makes clear that the *Jackson*, standard rather than the *Strickland* standard was applied to Grounds #5 to #7:

EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #5

> The prosecution's theory *could* reasonably be interpreted by the jury as calling into question Petitioner's ability to handle another failure, the loss of his business a second time to a wife who could no longer put up with his drug addiction. (See R&R, p. 28(22-26).)
>
> There was also more at stake than just the business. There was the *possibility* that Petitioner could lose custody of his son. Thus, even if Trial Counsel had presented evidence of Petitioner's alleged financial independence, the jury *could still* find the prosecution's motive theory credible. As Petitioner has failed to show prejudice, this claim must fail. (*Id.*, at p. 29 (1-5).) (emphasis added)

EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #6

> Even if the jury believed every word of Petitioner's testimony regarding his wife's anger, they *could still* have found him guilty of first degree murder. . . . The jury *could* reasonably have

found that holding a computer cord around someone's head or neck is highly likely to lead to strangulation and death. Additionally, the jury *could still* have determined that during the struggle Petitioner had the opportunity consciously to choose between walking or running away from the house and his upset wife or killing her. They *could* reasonably have found that Petitioner's actions following the murder were evidence of his consciousness of guilt. Finally, they *could* have found that Petitioner, based on his lies to family, friends, and police officers, was not a credible witness and therefore did not believe that this was an accident.

(R&R, pp. 31(24) – 32(12.) (emphasis added)

EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #7

Therefore, [Petitioner] concludes, the jury *must have* interpreted this receipt to mean that Susan knew of Petitioner's infidelities, and that destroyed his credibility which led them to convict. The jury therefore *did not need to infer* that she *knew* of his contact with prostitutes. . . . The jury *could* therefore have determined that based on her suspicions she decided to get tested. . . . Thus, exposure of the jury to this extrinsic evidence *did not necessarily* incriminate Petitioner or unduly influence their determination of guilt or innocence. [ ] As discussed previously, even if the jury believed Petitioner's testimony that he was only responding in kind to his wife's rage, the jury *could* still have found him guilty.

(See R&R, pp. 34(20) – 35(7).) (emphasis added)

Seen through the lens of *the Strickland* standard the above excerpts almost .concede prejudice under *Strickland*

for Grounds #5 and #6 and *Brecht* for Ground #7. With respect to the excerpts drawn from the Magistrate Judge's disposition of Ground #5, it is apparent that under the Magistrate Judge's conception of the case, the proffered evidence negating motive in the case would likely have impacted the jury's assessment of the strength and nature of motive in the case, removing social shame, anger over removal from the checking account, and the financial motive, leaving only the possibility of the loss of custody of his son.

B.

THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #5 IS FLAWED

The Magistrate Judge assumes "without deciding" that trial counsel was ineffective in failing to present evidence impairing the State's motive theory. She confines her argument to prejudice. (See R&R, p. 28(13-14).) What then was the prejudice flowing from counsel's presumed incompetence?

The Magistrate Judge responded, in part, to Ground #5 by refocusing the State's motive theory. The Magistrate Judge put greater emphasis on the idea that it was not the loss of Petitioner's business *per se* that troubled Petitioner. As the Magistrate Judge put it:

> The prosecution's case also presented the theory that it was not just losing the money and the business but losing the money and business *again*. The prosecution established through questioning, and Petitioner's fourth step diary documents, that Petitioner's first wife sold his business and divorced him while he was

> incarcerated for his second felony offense. (R.T. at 787, 788, 892; Fourth Step Diary At 5 – 6, 7). The prosecution's theory could reasonably be interpreted by the jury as calling into question Petitioner's ability to handle another failure, the loss of his business a second time to a wife who could no longer put up with his drug addiction.

(See R&R, p. 28(17-28).) (emphasis original)

There are at least two problems with the reasoning quoted above. First, fact findings of State courts, when made after due inquiry, are entitled to a presumption of correctness. (28 U.S.C. § 2254(e)(1).) This presumption cuts both ways, applying to findings favoring Petitioner as well as those favoring the State. (Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (3rd Ed. 1998, Lexis Press) § 20.2c fn. 47; *Bland v. California Department of Corrections* (9th Cir. 1994) 20 F.3d 1469, 1474, cert den. 513 U.S. 947 (1994).) Therefore, the authoritative description of the State's motive theory is found in the California Court of Appeal's opinion, not in the Magistrate Judge's reassessment thereof:

> The evidence of motive was extremely strong. Defendant was addicted to drugs, and Susan had removed him from the business checking account, depriving him of this source of money. Defendant was angry about this. Susan had discovered defendant's fourth step notes. This discovery could have led to divorce, loss of the business, separation from his son, and the exposure of defendant's past to the community.

(Appen. Respondent's Answer Exh. #5, p. 13 [CCOA Opinion]; see also RT 892(15) – 893(1), 943(1-3) [prosecutor's arguments].)

The notion that Petitioner psychologically recoiled from a repetition of events occurring in his last divorce formed no part of the Court of Appeal's fact-finding regarding motive. That Court ranked and listed the motive themes it deemed to be significant. This Court is not permitted to reject or modify the Court of Appeal's assessment of the salient components of the State's motive theory unless it is upon "clear and convincing evidence". (See 28 U.S.C. § 2254(e)(1).)

It is also significant that respondent did not press any argument under the nuance in the State's motive evidence upon which the Magistrate Judge now places primary reliance. (See Respondent's Answer, pp. 60-63.) Conclude therefore, that de novo reevaluation of the motive evidence in the trial record is inappropriate. The controlling description of the State's motive theory is that of the California Court of Appeal.

Second, the Magistrate Judge's theory of murder to avoid reinjury to old psychological wounds, is completely undermined by the extra-record evidence upon which Ground #5 relies. Petitioner presented sworn facts in support of the petition establishing that Petitioner could have had no fear of a repeat of the traumas of his first marriage. He utterly controlled the business this time around:

> In August of 1992, I consented to my wife's request that I withdraw as a signator on the business (MacSource) checking account. I understood her concern that I might relapse into the use of drugs and use business funds. Susan was quite firm about wanting me to do this, and after some argument on the subject, I agreed in the interest of marital harmony and to demonstrate my good

> faith. I was not pleased with the step – because it meant I was not being taken at my word as to my resolve to stay drug free. *My wife needed my consent to this step because I owned half of MacSource's stock, was its largest creditor, and because I was CEO Chairman of the Board, and President of the company.* She had no legal authority to compel me to concede my signature power. Quite the opposite, *I was in a position to remove her from the account if I so wished.* Jerry Hamilton, Reed Harris and Carl Campbell were all aware of the fact that I consented to being removed from the account.

(Exh. #1 (para 42), to P & A in support of Second Amended Federal Petition.) (emphasis added)

Petitioner's accountant, Carl Campbell, through Exhibit #4 to P & A in support of Second Amended Federal Petition, tells us that MacSource was insolvent at the time of Petitioner's arrest, that "78% of the total shareholder loans to MacSource" were the separate property of Petitioner, and that the company owed Petitioner "more than $140,000". The rest of the community property was worth only $18,400 at the time of Petitioner's arrest. (See Exh. #4, para 1-6, to P & A in support of Second Amended Federal Petition.)

Obviously, on these facts, Susan would not have gotten control of the unprofitable and insolvent business described by Mr. Campbell. The liquidation of the business upon Petitioner's arrest yielded nothing. (*Ibid.*) Upon any reckoning in a divorce proceeding, the business would. have been appraised as valueless. The fact that Petitioner controlled 78% of the insider debt, all the ranking corporate officerships, and 50% of the stock means that Susan would have been off the checking account and barred from

the business premises whenever Petitioner chose to do so. As Petitioner said: "I was in a position to remove her from the account if I so wished." (Exh. #1 (para 42), to P & A in support of second Amended Federal Petition.)

Susan would have been entitled to child support and, possibly, alimony, but on the facts before the Court, Petitioner would have had no fear of losing control of the technically bankrupt entity called "MacSource". Obviously, the Magistrate Judge unintentionally overlooked (or failed to account) for these facts. As a result, unwittingly, her argument supports a finding of prejudice. By postulating that the jury relied upon a motive theory that is conclusively rebutted by the extra-record evidence supporting Ground #5, the Magistrate Judge compellingly demonstrates how advantageous it would lave been to have exposed the jury to the truth. The alternative motive theory that the Magistrate Judge raises and relies upon is born of the same false impression of Petitioner's circumstances that counsel negligently failed to dispel. The jury should have heard that Petitioner's position with the company gave him the legal right to oust Susan from the company *at any time.* With 78% of the insider debt – over $140,000 – Petitioner could have foreclosed on the insolvent company at any time, thereby nullifying the remaining equity holders. It happens all the time.

Apparently Petitioner *had learned* from his first experience with divorce. He had structured his affairs so there would be no repetition of the traumas of his first divorce. The jury should have known that. Given the reasoning of the Magistrate Judge, this evidence was obviously vital and exculpatory. Rather than exposing a flaw in "petitioner's reasoning, the Magistrate Judge's analysis has exposed a further dimension A trial counsel's

negligence and a further demonstration of the inadequacy of the State's motive theory in the face of the proffered extra-record facts.

C.

THE MAGISTRATE JUDGE'S SECONDARY EMPHASIS ON THE POTENTIAL LOSS OF ACCESS TO PETITIONER'S SON IS MISPLACED

The Magistrate Judge had one other argument in favor of her recommended disposition of Ground #5. Although it appears to be almost an after-thought, Petitioner shall not neglect it here. This is the depressing notion that Petitioner would premeditate the murder of his wife to avoid losing custody of his son. This was one of the motive theories mentioned by the California Court of Appeal, albeit one that was nearly last in it reckoning of them. It was also mentioned by the prosecutor at trial. (See RT 892(15), 943(2).) And, so it remains: the only reed upon which the State case on motive can lean after Petitioner's habeas evidence is accounted for. What would the jury think of this 'motive' *standing alone*? This question is the only logical remnant upon which prejudice analysis can be performed after a proper accounting is taken of Petitioner's extra-record habeas evidence.

There was no *evidence* that Susan threatened divorce in the face of finding the Fourth Step notes. There was no *evidence* that loss of custody even occurred to Petitioner in the few waking hours between Susan's seizure of Petitioner's Fourth Step notes, and her death. Would a jury likely believe that Petitioner *premeditatedly and deliberately* killed his wife *and unborn child* to preserve custody of his two-year old? Was there anything in the State's case

that bespoke of such a monstrous psychosis? Given what the jury knew, and might surmise, of Petitioner's lascivious and immoral past, would a jury that believed he was motivated by a desire to return to his old habits also find it likely that he would *want* custody of his son? Was he that type of man? Are those two motives even consistent? And, if he really was attached to the idea of maintaining custody of his son, what would account for his supposed premeditated willingness to kill his unborn child? No, far more likely – nay, inevitably – in finding a premeditated murder the jury had to believe Petitioner was driven by anger at being ousted from control of the business checking account, fear of being taken to the cleaners in a divorce, and the sockdologer: desperation at the prospect of being blocked from money needed to finance future drug-use. Drugs and money, and to a lesser extent, scandal, are the only plausible motives to support a murder *with premeditation and deliberation.*

There was nothing in the profile of Petitioner given to the jury that would have allowed them to reasonably conclude that Petitioner had killed his wife to foreclose a child-custody battle, when there was no evidence such litigation was even threatened. The Magistrate Judge's secondary reliance on the conjecture that Petitioner feared the loss of his son would follow Susan's reading of the Fourth Step Notes is unpersuasive.

D.

AN ACCURATE PORTRAYAL OF THE SCOPE OF GROUND #5

The Magistrate Judge clearly misperceived the scope of Ground #5. In her words: "[Petitioner] asserts that the

only motive presented by the prosecution was Petitioner's alleged financial concerns". (R&R, p. 27(18-19).) Actually, the extra-record evidence that supports the Second Amended Federal Petition nullifies five different aspects of the State's motive theory. Here they are, in order of their appearance in the State Court opinion:

(1) The notion that Susan had taken action with regards to the business checking account, denying "Petitioner of a source of money to "buy drugs";

(2) The notion that Petitioner was "angry" because he could no longer access that account;

(3) The notion that divorce would have been financially devastating to Petitioner;

(4) The notion that Petitioner was afraid that his wife would reveal his sordid "past to the community"; and

(5) The notion that Petitioner would have lost his business in a divorce.

(See Respondent's Answer Exh. #5, p. 13 [CCOA Opinion], and compare Exh. #1 (para 39, 40, 42), to P & A in support of Second Amended Federal Petition; Exh. #4 [Carl Campbell declaration] to P & A in support of Second Amended Federal Petition; Second Amended Federal Petition, Ground #5, point 2 [verified at p. 24].)

It should be noted that the Second Amended Petition at Ground #5, point 2, clearly states that Petitioner, at the time of his arrest, in his separate property, was a millionaire. While the Magistrate Judge notes that Carl Campbell, Petitioner's accountant, did not include an estimate of

Petitioner's separate net worth in his declaration, this is hardly relevant. If the Magistrate Judge doubts Petitioner's sworn assertion on this point, the appropriate response is to set the matter for an evidentiary hearing. Respondent did not contest the assertion. It must be assumed true for the purposes of this Court's analysis.

E.

THE CRUCIAL ROLE OF MOTIVE IN THE CALJIC INSTRUCTIONS REGARDING FIRST-DEGREE MURDER, PREMEDITATION, AND DELIBERATION

CALJIC No. 8.20 states:

> To constitute a deliberate and premeditated killing, the slayer *must* weigh and consider the question of killing and the reasons *for and against such a choice and,* having in mind *the consequences*, he decides to and does kill. (emphasis added)

What would such a weighing and consideration of the "question of killing and the reasons for and against such a choice" sound like? It would have to be an inner soliloquy *on motive.* To wit: what shall I gain by this act? This jury instruction is not permissive. It uses the word "must". Thus, given the absence of any evidence that would pass muster under CALJIC No. 2.01 of "planning", the jury must have relied heavily upon the State's motive theory. In ruling on Petitioner's sufficiency-of-evidence challenge, the California Court of Appeal certainly did. (See Respondent's Answer Exh. #5, p. 13 [CCOA Opinion.) By the terms of CALJIC No. 8.20, the jury could not convict unless they

believed that Petitioner consciously performed a cost-benefit analysis before the deed was done. And, what would the jury imagine that reckoning to have been without the false considerations of motive which the trial prosecutor spread before the jury?

CONCLUSION

Make no mistake, Petitioner is not saying that he would have been a free man but for trial counsel's failure to rebut the State's false motive evidence. Nor, is Petitioner arguing that "no reasonable jury *could*" have found proof beyond a reasonable doubt if they had been acquainted with the truth. Petitioner is saying that there is a "reasonable probability" that he *would* not have been convicted of *premeditated,* deliberate murder. The State's case was too dependent on its false motive theory to be unaffected by the expression of the truth. They had no evidence of planning. The State's false motive theories were so pernicious because, on the unique facts of this case, a reasonable jury would be unlikely to be satisfied with the State's case for premeditation under CALJIC Nos. 8.20 and 2.01 without a persuasive theory of the considerations "for and against" the act which allegedly occupied Petitioner's thoughts at the time of that act.

As the California Court of Appeal notes, Petitioner was seen "limping and had a bandage on his left hand" the day after Susan's death. (Respondent's Answer Exh. #5, p.3 [CCOA Opinion].) The deep bite mark (see RT 729-730) on Petitioner's hand was not consistent with Petitioner suddenly locking on Susan's neck and choking the life out of her. It was not consistent with an attack with the computer cord from behind. It, together with the other

physical evidence, was consistent with a fight that ended with Susan being strangled. The State's theory was that the fight occurred over Susan's discovery of Petitioner's Fourth Step notes. (RT 892 (10-14), 944(10-13) [prosecutor's argument].) So there was an argument, there was a fight, and there was Susan's death at Petitioner's hands. What did the jury have as supporting a finding of premeditation and deliberation *other than* the State's motive theory and the mere fact of manual strangulation? Nothing of consequence. California law conceded that the method of the killing would not, in and of itself, settle the premeditation question. (See Respondent's Answer Exh. #5, pp. 13-14 [CCOA Opinion].) Moreover, the existence of provocation can justify a finding of Second-Degree Murder notwithstanding some evidence of premeditation. (CALJIC No. 8.73.)

This case, once the trial record is purged of the false motive theory, read at best as no more than a murder with malice, a murder under provocation, the galling provocation of a justifiably enraged wife who was shocked at the revelation of her husband's infidelity with prostitutes. As the prosecutor said in his summation:

> [I]f Susan Kurtz, after reading the Fourth Step . . . had confronted him and killed him in a rage that night, she would have a good argument for voluntary manslaughter.

(RT 947 (1-5.)

In the most generous reading of the State's case absent the motive evidence, one might reasonably conclude that Petitioner responded to his wife's rage, blows, and bites, maliciously and with intent to kill or reckless

disregard for her life. But reaching deliberate, *premeditated* murder without the State's false motive theory, takes one deep into the realm of conjecture. To wit: perhaps it was not happenstance that Petitioner had an electrical cord around his neck; perhaps it was not happenstance that this occurred on a day that no one expected to physically interact with Susan; perhaps Petitioner planned to remove her body in the van, perhaps he was balked by her weight; perhaps he was thinking clearly enough during their struggle to "weigh and consider" the reasons for and against killing Susan – perhaps. Perhaps all former drug users who consort with prostitutes only commit premeditated, deliberate murder. Perhaps the only consciousness of guilt that one can have is consciousness of guilt for first degree murder.

Far more likely, this was a second-degree murder or manslaughter. After all, petitioner had to know that *one day* he was going to have to tell his wife about the infidelities. Such disclosure was an inevitable and sequential part of the 12-Step program that Petitioner was so diligently executing. The most likely inference is that Petitioner expected that his wife would be able to withstand and recover from that shock. She was participating in the Alanon program, and would have had the support of other women and men who had to forgive their spouses for similar offenses. His wife had risen to the occasion for the revelation of a drug-addiction. Given these circumstances, why would Petitioner jump to the conclusion that his wife's reading of his Fourth Step spelled the doom of their marriage, his business, and his entire way of life? Far more likely, the fight started with unexpected provocation and hard words from Susan. Susan, who outweighed Petitioner by 100 pounds (R&R, pp. 6-7), provoked a fight

which sufficiently disoriented and dazed Petitioner so that her death could come about as he described, or that her hard words and blows so inflamed Petitioner that he became utterly heedless of the consequences of the violent spirit that animated him.

The record does not offer much support for the idea that Petitioner was the sort of man who would premeditate and deliberate such wickedness. This man was not an addict wallowing in his evil habits. He was conscientiously trying to remake and redeem himself. The confession of his past to the community (see Exh. #1 (para 40) to P & A in support of Second Amended Federal Petition – a hard step, his reconciliation with his wife, the rigor and painful self-analysis called for by the 12-Step Program, the voluntary relinquishment of his signature power on the checking account, these were the landmarks of his recent past. To say that the tragedy of that day was planned is an offense against the revealed nature of this man. There is a world of difference between first-degree murder and second-degree murder. The former is committed by an entirely different caliber of man. That this was a first-degree murder is a wicked misconception that took root in the fertile soil of a wholly illusory motive. Men of bad character are not all of one stripe. It is as if Petitioner's jury was told that Petitioner had a huge and unnecessary insurance policy on his wife. Once a fact of this case, such a patent falsehood, foisted on an unwitting jury due to the negligence of a defense attorney, would be grounds for a reversal. Petitioner's proffered evidence is of the same nature and to the same effect.

Petitioner's *first-degree* murder conviction should be vacated.

OBJECTION #6

THERE IS A REASONABLE PROBABILITY THAT TRIAL COUNSEL'S FAILURE TO PRESENT SUSAN'S ALANON DIARY BROUGHT ABOUT PETITIONER'S CONVICTION

GROUND #6: ATTORNEY SMITH VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING [O PRESENT ENTRIES FROM SUSAN'S "DIARY" DEMONSTRATING THAT AN AVALANCHE OF ANGER WAS PENT-UP INSIDE HER – WANTING TO BE LOOSED ON PETITIONER IF HE PROVED TO BE UNFAITHFUL.

A.

WAS TRIAL COUNSEL'S FAILURE TO PRESENT SUSAN'S DIARY NEGLIGENCE?

1.

WAS THE DIARY ADMISSIBLE?

The Magistrate Judge found that "Petitioner fail[ed] to address whether this 'Diary' would even be admissible." (See R&R, p. 30(3).) Actually, Petitioner did. (See Memo of P&A in support of Second Amended Federal Petition, pp. 66(18) – 67(16); Traverse, p. 68(2-14).) The Magistrate Judge opines that the trial court would not have admitted the diary because it was dated "November 6, 1991 and October 3, 1992", "a year to three months prior to the event in question" (R&R, p. 30(11-12).) The Magistrate Judge believes that this hiatus would have rendered Susan's account of her state of mind irrelevant. Petitioner has several responses.

First, it is unlikely that the trial judge would have adopted double standard as far as the admission of state of mind evidence. The trial court had admitted Petitioner's statement, allegedly made in September or October of 1992, to Dale Shimono, allegedly to the effect that Petitioner sometimes felt that it might be easier if his wife was dead. (See RT 236-237.) Moreover, the trial judge allowed the parties to question witnesses about the entire multi-year relationship between Mr. and Mrs. Kurtz. He would hardly be able to declare Susan's state of mind about that relationship inadmissible because it was dated fourteen months and three months before her death. The case for admission under California Evidence Code section 1250 of the Shimono statement is far more tenuous than expressions of emotion in Susan's journal because the former was a single isolated remark made when the relationship between Mr. and Mrs. Kurtz was in a very different phase than it was when Susan died.[1]

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[1] Substantial *uncontradicted* evidence was presented at trial establishing that Petitioner was quite even tempered with Susan and that he had a character trait for non-violence. (See RT 561-566, 610-613, 616-620, 696-697.) Assuming arguendo that Petitioner made the statement Shimono claimed, he did so months before during a period of time of marital difficulties and separation from Susan. (RT 235-236, 239-248.) The State could not produce a single witness showing that Petitioner had ever struck his wife, and Susan's diary does not reveal any such incident either. The disputes between the couple were all verbal. (RT 199, 206-207, 234-235, 678-679.) The prosecutor left uncontradicted evidence that his wife and he had reconciled their differences in a shared joy at two blessings that had come into their lives: Susan had become pregnant with their second child and Petitioner appeared to be winning the war against drugs and alcohol. He had been clean for over nine months at the time of Susan's death. (RT 132-133, 167, 173-174, 658-659.)

Second, Susan herself dated her journal "Nov 6, 1991, and then again on Oct. 3, 1992" – thus, indicating that the beliefs and feelings expressed in the journal endured for at least the 10 months between working sessions on the journal. This readoption and reexpression of the sentiments expressed in the journal logically justifies a high-degree of confidence in their relevance at the time of Susan's death. Indeed, who can read the journal and conclude that anything beyond a decade of loyal, honest, companionship and caring would clean the deep wounds in Susan's psyche? It is simply not reasonable to suggest that the trial judge would have reason to believe these feelings and beliefs were ephemeral.

Third, the Magistrate Judge's analysis conflates two distinct foundational inquires. The hearsay analysis is separate from the relevance evaluation. Under California law, one must establish that the statements fall within an exception to the Hearsay Rule by a preponderance of the evidence. (Jefferson's *California Evidence Benchbook,* supra, § 25.11.) The Magistrate Judge impliedly conceded – and it could not be seriously questioned – that Susan's statements fall within Evidence Code section 1250. A 20-year old expression of state of mind would qualify under section 1250 as easily as a three-hour old statement. The Magistrate Judge's remarks about the date of the journal go to its *relevance* or to analysis under Evidence Code section 352. Under California law, the relevance threshold is easily crossed. (Jefferson's *California Evidence Benchbook,* supra, §§ 21.16-21.27; Cal. Const. Art. I, § 28(d); Cal Evid C § 210; *People v. Hill* (1992) 3 Cal.4th 959, 987-988.) Thus, the admissibility of the evidence is not really called into question by the Magistrate Judge's argument.

Fourth, respondent did not argue admissibility. (See Respondent's Answer, pp. 44, 60-63.) Presumably, if there was some glaring flaw in the foundation for admission of the document, respondent would have pointed it out.

2.

DOES THE DIARY SHOW A WOMAN FILLED WITH REPRESSED RAGE OR A "REASONABLE" ONE?

The Magistrate Judge remarks:

> As Petitioner admitted, read in its entirety this document creates a picture of Susan as a woman who was disappointed and disillusioned by the reality of her marriage. Far from evidencing that she was a powder keg of 'repressed rage', it shows that she also took responsibility for the problems in her marriage.

(R&R, p. 30 (18-22).) Thus the Magistrate Judge posits that it is reasonableness not repressed anger that the diary establishes. Petitioner is surprised that the Magistrate Judge sees reasonableness and repressed anger as somehow mutually exclusive. What could be more reasonable than to be utterly furious with Petitioner? It was the most *reasonable* thing in the world to be "mad", to feel "anger" and moments of "rage" – to use Susan's words – given Petitioner's behavior, even before she learned of his frolics with dozens of hookers while she was pregnant with their first child. (See Exh. #11 to P & A in support of Second Amended Federal Petition [Petitioner's 4th Step]; Exh. #10 to P & A in support of Second Amended Federal Petition [Susan's diary].)

In fact, one might have assumed that Susan was furious – even without reading her diary – if it had not

been for the counterfactual portrait of her psychology that was foisted on the jury at trial.

The jury was told, in essence, that Susan had an even and mild disposition that reacted with "concern" to her husband's travails, but without anger. The evidence on this point is fully outlined in the Memorandum of Points and Authorities filed in support of this Second Amended Federal Petition at pages 59 to 62. If there is any question of Petitioner's characterization, this material should be reviewed before this Court proceeds any further in the adjudication of this Objection. Because of the state of the evidence, including Petitioner's own testimony about Susan's mild demeanor, the prosecutor was able to ridicule Petitioner's defense in his closing arguments. The prosecutor pointed out that:

> [Petitioner] says [that] there was a fight. That is coming from his mouth and his mouth only.

(RT 943(13-14).) Susan, the prosecutor continued, was a person who "never raised a hand to anyone before, even [the defendant]". (RT 944 (8-9); see also RT 795 (16-22) [Petitioner's admission to that effect].) The prosecutor derided the notion that such a person would "all of a sudden . . . . comes at him in this raging attack and he has to defend himself". (RT 944(14-17).) At another point in his argument, the prosecutor told the jury that if they believed Petitioner, they had to accept as true "that a pregnant woman who had been relegated to bed rest who had never raised a hand to anyone in her life attacked him; . . . She. . . . went into a rage and attacked him". (RT 900(16-21).) In this way the prosecutor's argument mirrored the state of the evidence and accurately captured the extent to which Petitioner's fate turned on the jury's

assessment of whether Susan had it in her to become as angry as Petitioner claimed she was on January 4, 1993. (See RT 722, 732-733, 840-842.)

Contrary to the Magistrate Judge's apparent conception of Ground #6, it does not depend on the fact that Susan's diary revealed some sort of bizarre or aberrant psychological condition. Rather, the diary is important because it would have been *the only evidence* capable of demonstrating that Susan was not the person that her relatives and Petitioner believed her to be. There were a lot of feelings that she apparently did not express, *except on paper.* It turns out that she was not the long-suffering sort that can immediately forgive he husband, no matter how deplorable his conduct. There are many unfortunate women that will take an almost infinite amount of abuse, 'BWS' or "Battered Wife Syndrome" is named for that, all too common, psychological disposition. There are many other women who are so profoundly spiritual that they are able to meet the follies of their husbands with complete faith, forgiveness, and love. As we all know, often such love is redemptive.

The problem that arises when one reads the trial record is the evidence suggests the wrong categorization of Susan. One would think that she was one of those rare women who was more 'saintly' than human. Again, Petitioner offers his summary of that evidence at pages 59 to 62 of the Memorandum of Points and Authorities in support of his Second Amended Federal Petition. The point of the diary is that it accurately portrays Susan's psychological ferment over her husband's behavior.

Given the conviction for first-degree murder, it is apparent that the jury bought the prosecutor's argument

about the utter improbability that 'mild, long-suffering' Susan would have boiled over in rage upon discovering evidence of Petitioner's unfaithfulness with prostitutes during their marriage. There is nothing surprising in Susan's actual emotional disposition – as revealed by her diary. Prejudice arises in relation to Ground #6 only because the contents of that diary *would have been surprising to the jury.* In fact, the prosecutor would have been unable to press his main attack on the credibility of Petitioner's *story* (as contrasted with the myriad attacks on Petitioner's character and veracity) had the diary been in the jury's hands. With access to the diary, there would have been a "reasonable probability" that the jury would have been unable to reject, "beyond a reasonable doubt", Petitioner's scenario. This is the gravamen of Ground #6 – and, it is a point that fully justifies reversal.

3.

WAS THERE A PLAUSIBLE DOWNSIDE TO THE ADMISSION OF SUSAN'S DIARY?

The Magistrate Judge opines that:

> Additionally, Trial Counsel *may have* chosen not to introduce this document as there were damaging statements about Petitioner. For example, Susan wrote: 'I felt afraid that I had to make love to him after he came home . . . because of the way he would act – mad, hostile, aggressive, accusatory.' (Susan's Step Diary at 3). Contrary to character witness testimony at trial, this statement suggests that Petitioner may have had a history of violence or aggression towards his wife.

(R&R, p. 30(22-28).) (emphasis added)

Petitioner respectfully submits that the Magistrate Judge has drawn an unreasonable inference. The natural conclusion one draws reading the diary is that its author poured her heart out onto those pages. If Petitioner had ever hit her, it would have been noted. If he was prone to screaming at her, it would have been duly noted and remarked upon. In context, it is clear that the sort of "mad, hostile, aggressive, accusatory" behavior to which Susan refers to is a sort of stiff-necked surliness and argumentation – not the sort of spousal abuse that is governed by the Penal Code. To hypothesize that the quoted phrase "suggests that Petitioner may have had a history of violence or aggressiveness towards his wife" – is to posit that Susan was holding back the worst of his behavior, a gloss that the journal does not allow us to take seriously. Its tone is just too candid. Susan mentions slights and wrongs that would pale in significance if contrasted with any story of actual physical abuse. The diary therefore corroborates Petitioner's testimony regarding his lack of violence or physical aggressiveness towards his wife.

The Magistrate Judge also asserts:

> Susan had also written: "[I] just pretend that if he tells me he hasn't slept with anyone and that he used new needles that it will be O.K." (Susan's Step Diary at 4). This suggests that she didn't believe Petitioner when he told her that he had never had intercourse with other women.

(See R&R, pp. 30(28)-31(2).)

Petitioner qualifiedly agrees in this instance with the Magistrate Judge. It does suggest that she did have *doubts,* possible strong doubts, about Petitioner's fidelity.

Petitioner has never contended otherwise. However, there is an important distinction to be made. In her journal, Susan does not express *certainty* about any of the bad behavior which Petitioner *did not himself admit.* For example, she found 900 phone numbers on her phone bill. Petitioner asserted "it was an error on [their] billing" and had the phone company reverse the charges. Now, given the context, most of us would have utterly rejected Petitioner's explanation. But, Susan got no further than to conclude that Petitioner "*probably* did them". She stated in her journal that Petitioner's behavior "makes me *very mad* . . ., because it makes me wonder if he really did just stop at just this . . . that he didn't sleep around". (See Susan' Step Journal.) Thus, the journal dispositively establishes that Susan had doubts, *painful doubts,* about Petitioner's fidelity that made her "very mad", – but no proof. For this reason, the Magistrate Judge's observation about the significance of Susan' doubts is not well taken.

The journal shows a woman that waited on Petitioner to admit misbehavior to her, a woman that lacked the disposition to draw *and act* upon logical inferences. She was hemmed in by her insecurities, her hopes and beliefs for her marriage, her love for Petitioner. She did not want to believe the worst. She was clinging to her faith in God and to her dreams for her life. She could not stand how Petitioner's squalid behavior, even that short of the full betrayal that infidelity with prostitutes would represent, made her feel. She recoiled from the "rage" (Susan's words), the boiling emotions that had her "so mad" she could "spit", because she did not know how to reconcile those feelings with her religious training and views and her plan for her life. (Petitioner summarizes the pertinent passages from Susan's Journal at pages 62 to 66 of the

Memorandum of Points and Authorities filed in support of the Second Amended Federal Petition.) Even after all the trauma, Susan wrote: "I still so much want to fix things for him." (Exh. #10, p. 3(para 3), p. 4(para 5) to P & A in support of Second Amended Federal Petition.) She felt God wanted her to act out the role of a good, patient, wife. (*Ibid.*)

This is the tale told by Susan's journal. She needed Petitioner's *admissions* to justify her feelings, to ripen her frustrated anger into action.

4.

WERE THERE OTHER PITFALLS TO ALLOWING THE JURY TO HAVE ACCESS TO THE DIARY?

Petitioner was not on trial for consorting with prostitutes, using drugs, being a first-class jerk, or betraying his wife's trust. There is nothing in Susan's journal that cheapens Petitioner's character beyond what the prosecutor and Petitioner's own attorney managed to do through their own devices. Petitioner's Fourth Step goes a good deal beyond Susan's journal in trashing Petitioner's character, and the jury had access to it.

It is interesting to note that neither the Magistrate Judge nor Respondent has been able to point to any act or event in Susan's diary which was outside the range and nature of the bad character evidence that came in against Petitioner at trial.

5.

WHY IT IS UNREASONABLE TO ASSUME A "TACTICAL" EXPLANATION FOR TRIAL COUNSEL'S FAILURE TO USE THE DIARY

It would be unreasonable to assume, without the benefit of an evidentiary hearing, tactical avoidance as the explanation for trial counsel's nonuse of Susan's diary. Trial counsel himself admitted that Petitioner's Fourth Step came into evidence because *he was ineffective*. Counsel specifically cited himself for this failing in the Notice of Appeal that he filed on Petitioner's behalf. (See Exh. #13 to P & A in support of Second Amended Federal Petition, or CT 310-311.) In fact he cited himself as ineffective on three counts. (*Ibid.*) It would therefore be unreasonable to dispose of Ground #6 on guesswork and supposition.

B.

RESPONDING TO THE MAGISTRATE JUDGE'S REMARKS CONCERNING PREJUDICE

1.

THE MAGISTRATE JUDGE'S OBSERVATION THAT SUSAN'S DIARY DOES NOT EXPLAIN WHY SHE DID NOT REACT IMMEDIATELY UPON FINDING THE DOCUMENT

The Magistrate Judge states:

> Petitioner states that a key fact going to the need for this corroborative evidence is that the prosecution did not question Susan's finding of the 'Fourth Step' paperwork but rather her reaction to it. The prosecution questioned why Susan didn't react with violence immediately upon

> finding the document. Admission of her diary does not answer this question.

(R&R, p. 31(18-23).)

Petitioner agrees that Susan's journal does not answer this question. But how important is this omission? Have not all human beings had experience with brooding on a wrong and then suddenly lashing out verbally and physically about it? Does such a common aspect of the human condition need proof and evidence? In any event, the answer to the question was supplied, to a large extent by Petitioner's testimony, the pertinent aspects of which the Magistrate Judge very capably summarized at page 29, lines 12 to 26 of her Report. Apparently, after being rebuffed by Petitioner in her reasonable demands for an explanation, Susan spent a (probably) sleepless night crystallizing the implications of Petitioner's admissions in mind. Then exhausted and frightfully angry, she exploded when Petitioner had the cheek to suggest that *she* by a remark *she* made, was inappropriately taking her anger out on their child. (See RT 713-715; or see R&R, p. 29(12-26).) One can imagine how Susan could 'tee of' on that one.

The problem, then, was not that the case needed – or even lacked – an answer to the Magistrate Judge's question, it was that the diary was, albeit, some evidence to rebut the State's character portrait of Susan's mild, forgiving, disposition, and that she appeared to be a person that simply would not react in the way Petitioner claimed to Petitioner's Fourth Step. The prosecutor had many attacks on Petitioner's character, but very little to work with when it came to the substance of Petitioner's description of how Susan died. The false portrait of Susan's nature was what the prosecutor turned to in his

summation to defeat the substance of Petitioner's story. Doubtless, it was the basis the conviction for *first-degree* murder rested upon.

2.

THE MAGISTRATE JUDGE USED THE WRONG STANDARD OF REVERSAL IN RESOLVING GROUND #6

Petitioner explored the difference between the "probabilistic standard" of *Strickland v. Washington*, which focuses on what a reasonable trier-of-fact *would* do, and the *Jackson v. Virginia* standard, which focuses on what a reasonable trier-of-fact *could* do. (See supra, pp. 38-54.) This analysis applies with equal force here. The Magistrate Judge manifestly analyzed Ground #6 by asserting whether the jury "could still have found [Petitioner] guilty of first-degree murder" even if it had been apprised of Susan's diary. (R&R, p. 31(25).) In all, the Magistrate Judge uses the "could" formulation on *five* occasions in her summation on prejudice for Ground #6. (See R&R, pp. 31(24) – 32(12).) Thus, the Magistrate Judge's prejudice analysis is improper and should not guide this Court.

3.

THE MAGISTRATE JUDGE CONFLATES EVIDENCE DISPROVING SELF-DEFENSE AND ESTABLISHING THE COMMISSION OF A CRIME WITH EVIDENCE PROVING FIRST-DEGREE MURDER – AND THUS WRONGFULLY JUDGES THE ISSUE OF PREJUDICE FOR GROUND #6

Here is what the Magistrate Judge had to say on prejudice for Ground #6:

> Even if the jury believed every word of Petitioner's testimony regarding his wife's anger, they *could still* have found him guilty of first degree murder. It was Petitioner's actions in the face of Susan's anger that led to his conviction, not the actions of his wife. In the circumstances as described by Petitioner, there appears to be no reason for him not to have left the house. He testified that he was being hit and kicked; also said that it didn't really hurt. (R.T. at 719, 722.) He stated that he was not in fear of his life, but rather he was just trying to control his wife. (R.T. 746, 784-85.) The jury *could* reasonably have found that holding a computer cord around someone's head or neck is highly likely to lead to strangulation and death. Additionally, the jury *could* still have determined that during the struggle Petitioner had the opportunity to consciously choose between walking or running away from the house and his upset wife or killing her. They *could* reasonably have found that Petitioner's actions following the murder were evidence of his consciousness of guilt. Finally, they *could* have found that Petitioner, based on his lies to family, friends, and police officers, was not a credible witness and therefore did not believe that this was an accident.

(R&R, pp. 31(24)-32(12).) (emphasis added)

The Magistrate Judge's words appear to be a devastating attack on Petitioner's prejudice theory – that is, until one takes the passage line by line.

Petitioner concedes that Susan's diary would not have explained why, even under Petitioner's version of events,

he did not leave the house. But failure to take an opportunity to retreat does not negate self-defense *and* it does not prove *first-degree* murder. (See CALJIC No. 5.50.)

Petitioner concedes that he admitted that Susan's blows did not really hurt – many people do not register physical pain when they are fighting or immediately upon any accident, but shock sets in quickly in the face of brutality. While the deep bites on Petitioner's hand and the kicks (that were the cause of a noticeable limp the day after) certainly *must* have hurt later, in his analysis, it really does not matter. The seriousness of Susan's offer of violence would be relevant to whether Petitioner had justification to use lethal force. Petitioner's sensations would bear on a manslaughter theory and the issue of provocation. But, Petitioner's failure to really notice how much he was being *physically* hurt by Susan during their battle, does not have any tendency in reason to prove that he deliberated or premeditated her murder. It is his emotional state, that is, dazed, shocked, outraged, disassociated, etc., in the face of her unexpected ferocity, that is of greater significance in terms of the jury instructions.

Continuing to follow the course of the Magistrate Judge's analysis, Petitioner next concedes that the jury *could* reasonably have found that holding a computer cord around Susan's neck was "highly likely to lead to death". But, such a finding would not be dispositive on the varying elements of intentional murder in heat-of-passion (manslaughter), intentional murder with malice (i.e., second-degree murder), and first degree murder.

Petitioner likewise concedes that the jury "could reasonably have found that Petitioner's actions following the murder were evidence of his consciousness of guilt".

(R&R, p. 32(8-10).) Yet, an inference to consciousness of guilt would not allow the jury to assess the degree of murder or to exclude manslaughter. One can just as well be overwrought with guilt for the manslaughter death of one's wife as of her first-degree murder. In fact, one that kills in the heat-of-passion is more likely to feel remorse than a cold-blooded murder.

Petitioner concedes the jury could have found that "his lies" to everyone involved made him "not a credible witness". (R&R, p. 32(10-11).) But the negation of Petitioner's credibility could not supply the jury with proof of the degree of the crime either. The Magistrate Judge opines that the reasonable finding that Petitioner was not credible "could" have justified a determination that Susan's death was not "an accident". R&R, p. 32(10-12).) Voluntary manslaughter is an intentional murder, so is second-degree murder. If Petitioner lied, which crime did his lies cover?

In the end, the Magistrate Judge's accounting of the elements of the case that she feels disprove prejudice on Ground #6, actually end up *proving* prejudice for the claim. Conspicuously absent from the Magistrate Judge's massing of the evidence establishing first-degree murder, is any evidence that proves beyond a reasonable doubt *first-degree* murder.

Petitioner contends that it is reasonably probable that the jury got to first-degree murder about the same time that they bought 'hook, line, and sinker' the prosecutor's assertions that Susan's personality was incompatible with attacking Petitioner – regardless of the provocation that his Fourth Step nominally offered. For if the jury concluded that Susan, consistent with her character as they

were given to understand it, would never raise her hand against Petitioner – and this is certainly the position the prosecution took in his summation – then, and only then, could they negate the lesser degrees of homicide. Let us be objective. Susan's death could have occurred under a variety of scenarios. There is no direct, independent, evidence of either of Petitioner's or Susan's state of minds on the morning of January 4, 1993. The prosecutor's summation is, in the crucial matter of the one element separating first and second-degree murder, merely conjecture and rhetoric.

The certainty beyond a reasonable doubt of Susan's nonviolent reaction to the Fourth Step was the one *and only* indispensable element of the State's theory of Murder-One. If you believe it, then Petitioner had to have been the 'first-mover'. If he was the one that instigated the violence, a first-degree murder conviction is fully justified. If he wasn't, then it is far more difficult to get to the sort of certainty of premeditation that would carry the State's burden of proof.

For these reasons, the Magistrate Judge's free-wheeling accumulation of the weaknesses in Petitioner's case for acquittal (on self-defense or accident), or for voluntary manslaughter, are unavailing.

OBJECTION #7

GROUND #7 STATES A COMPELLING BASIS FOR REVERSAL

GROUND #7: PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO DUE PROCESS (FIFTH AMENDMENT) WERE VIOLATED

WHEN TRIAL COUNSEL SMITH NEGLECTED TO SEARCH A WALLET CONTAINING INADMISSIBLE HEARSAY EVIDENCE LATER FOUND BY THE JURY

Petitioner presented evidence that the jurors discovered Susan's HIV test receipt, discussed it, and that – for at least one juror – it was *the basis* of their verdict. (See Exh. #15 to #17 to the P & A in support of the Second Amended Federal Petition.)

Petitioner concedes that only the evidence that the receipt was found and widely discussed by the jury is admissible. (See R&R, pp. 33(11)-34(4).) The evidence that the receipt proved to be decisive is inadmissible. *(Ibid.)* Nevertheless, such evidence should chasten this Court from too much verbal wizardry in rejecting Ground #7. As the United States Supreme Court stated in *Tanner v. United States* (1987) 483 U.S. 107, 120-121, 97 L.Ed.2d 90, 107 S.Ct. 2739, evidence of the thoughts of jurors are excluded, but not because they are irrelevant or inherently untrustworthy. They are excluded on public policy concerns which have little to do with doing justice in an individual case. On the facts before this Court, this evidence *was* prejudicial. While Petitioner may not be able to insist upon inferences drawn from the inadmissible aspects of Exhibits 15 to 17 to the P & A in support of the Second Amended Federal Petition, the nature of the inadmissible aspects of the juror declarations should fully awaken this Court's conscience.

The Magistrate Judge dismisses Ground #7 on prejudice grounds as follows:

> Therefore, he concludes, the jury *must have* interpreted this receipt to mean that Susan knew of Petitioner's infidelities, and that destroyed his

> credibility which led them to convict. [ ] What Petitioner fails to acknowledge is that he had told his wife he was an intravenous drug user. The simplest explanation for the blood test was that Susan sought the test because of this behavior. The jury therefore *did not need to infer* that she knew of his contact with prostitutes. Alternatively, Petitioner testified that while Susan knew most of what was in his fourth step diary, she just didn't know the specifics. (R.T. at 793.) The jury *could* therefore have determined that based on her suspicions she decided to get tested. This would have been consistent with the evidence that Petitioner presented at trial. Thus, exposure of the jury to this extrinsic evidence did not necessarily incriminate Petitioner or unduly influence their determination of guilt or innocence. [ ] As discussed previously, even if the jury believed Petitioner's testimony that he was only responding in kind to his wife's rage, the jury *could* still have found him guilty. See discussion Claim D *supra*. Therefore, consideration of this evidence would have been harmless error and this claim must fail.

(R&R, pp. 34(20)-35(10).) (emphasis added)

There are several errors in this analysis:

First, as the underlined portions of the passage quoted above establish, the Magistrate Judge was again applying the standard of reversal that pertains in insufficiency of evidence challenges under *Jackson v. Virginia* to Petitioner's claims under the "probabilistic standards" of *Strickland* (Ground #7) and *Brecht v. Abrahamson.* (See supra, at pp. 38-54.) Petitioner's argument is not that the jury's discovery of the receipt "must have" been prejudicial, but that it was *reasonably likely* to have been

prejudicial and that its unrecognized presence in the evidence had a *substantially injurious* effect on the trial and its outcome. The Magistrate Judge's analysis to the effect that the jury *"could still"* have found for first-degree murder proves that her consideration of the claim tested it against the wrong metric.

Second, in supplemental briefing filed on July 24, 2000, Petitioner pointed out that California Health and Safety Code section 199.46(h) states that "[t]he AIDS virus is transmitted primarily through sexual contact . . . " This Legislative finding serves as the only reasonable benchmark for what California society, and hence, the jury, believed. The Magistrate Judge's supposition of other possible inferences is not premised on any similar authority. The main probability, is that the jury believed what we know from inadmissible evidence that they actually believed, that is, that Petitioner's infidelities were known to his wife prior to their fight and her death. In this supposition they were, of course, incorrect. (See Ground #6, supra.)

Third, there was nothing in the evidence to suggest that Petitioner, a relatively well off man, was sharing needles or associating with other drug users. The jury had no reason to make such an inference. As it is commonly understood, it is the poorer users of drugs – those that must share needles – that contract AIDS in that fashion. That sort of inference would not reasonably apply to Petitioner.

Fourth, the Magistrate Judge is unreasonable in asserting that Petitioner's testimony to the effect that Susan knew "most of what was in his Fourth Step (RT 793), even before she actually read it, could have given the

jury a reason to suspect that she new of his infidelities. Even the prosecution at trial proceeded under the theory that she did not know of Petitioner's infidelities until the night before her death. (RT 892(10-14), 944(7-13).) (The prosecutor had also read Susan's journal and *knew* she lacked confirmation of infidelity.) Thus, it is unreasonable to speculate that the jury would conjecture otherwise.

CONCLUSION

(AS TO GROUND #7)

In terms of the *Brecht* standard, Petitioner need not prove that Petitioner's credibility was *inevitably* destroyed by the HIV test receipt. The Magistrate Judge suggests that the jury "did *not need* to infer that [Susan] knew of [Petitioner's] contact with prostitutes". (R&R, p. 34(26).) The Magistrate Judge says the evidence "did not *necessarily* incriminate Petitioner", and that "the jury *could still have* found [Petitioner] guilty" even without the receipt. (See R&R, p. 35(2-7).) Crucially, the Magistrate Judge does not contest that the credibility-busting inference was the most likely one. Under these findings, the Court should reverse. When a federal habeas court finds constitutional trial error and is in grave doubt about whether the error had a substantially injurious effect or influence in determining the jury's verdict, the error is not harmless, and the Petitioner must win. *(O'Neal v. McAninch* (1995) 513 U.S. 432, 432, 130 L.Ed.2d 947, 115 S.Ct. 992, 993.)

Having disposed of Ground #6 under the *Brecht* standard, the Magistrate Judge summarily denied Ground #7, which also cited trial counsel for negligence under *Strickland* in failing to notice the receipt's presence in a wallet admitted into evidence, also on prejudice grounds.

(R&R, p. 35(11-17).) Thus, in objecting to the former, Petitioner has also objected to the latter. Notably, the Magistrate Judge assumed that trial counsel was negligent for failing to discover the receipt. (R&R, p. 35(17).)

A definitive explanation of the merits of Ground #7 can be found in the Memorandum of Points and Authorities in Support of this petition and the Traverse.

OBJECTION #8

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST CALJIC NO. 8.73

GROUND #8: PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY ATTORNEY SMITH'S FAILURE TO REQUEST CALJIC NO. 8.73 [RELATING EVIDENCE OF PROVOCATION TO THE DEGREE OF MURDER].

The Magistrate Judge states:

> Where the record shows that counsel deliberately chose not to request a specific instruction, and the record shows that the omission was reasonable, ineffective assistance of counsel will not be found. [Citation.] In the instant case, the record indicates that both counsels and the trial judge went over the instructions. (R.T. 888-89.) They covered sequentially CALJIC Nos. 8.70, 8.71, 8.72, and 8.74. (Id.) This tends to suggest that Trial Counsel examined CALJIC No. 8.73 and chose not to use it.

(R&R, p. 36(5-11).)

First, trial counsel filed a *Notice of Appeal* admitting three counts of ineffective assistance of counsel. (See CT

310-311; see also Exh. #13 to P & A in support of Second Amended Federal Petition.) Given trial counsel's dim view of his representation of Petitioner, the *Strickland* presumption in favor of a defense attorney's conduct cannot logically be applied to this case.

Second, the fact that CALJIC instructions on either side of CALJIC No. 8.73 were discussed in the trial conference on jury instructions, does not support any meaningful inference. A mistake is a mistake because it is a mistake. To say that the fact that CALJIC No. 8.73 was skipped is evidence that it was *intentionally* bypassed is to adopt a method of evaluating ineffective counsel claims which are unassailable by the aggrieved party. By the Magistrate Judge's logic every person who ever skipped an item on their grocery or other checklist, did so intentionally. These matters should be handled by an evidentiary hearing, not by speculation masquerading as legitimate inference. (See *Schell v. Witek*, supra, at 218 F.3d 1027.)

Third, as the California Court of Appeal held, trial counsel's primary focus in summation was in persuading the jury that the State had not proved deliberation. (See Respondent's Exh. #5, pp. 17-18.) CALJIC No. 8.73 by any analysis, would have helped him in this goal. Why should we assume that an error against the grain of his argument was intentional? It certainly was not wise. (See Objection #9, infra.)

The Magistrate Judge's second line of attack on Ground #8 was that:

> Additionally, Trial Counsel strategically chose an all or nothing approach in regard to sentencing. Had Petitioner been convicted of second degree murder he would have faced a possible sentence

> of fifteen (15) years to life, under Penal Code § 190, with no guarantee of parole given the facts of this case. As the California Appellate Court found, Trial Counsel's decision not to ask for this instruction so as to focus the jury on manslaughter was reasonable.

(R&R, p. 36(11-17).) Petitioner has several responses.

First, an "all or nothing approach" in this case was inherently unreasonable – just as it was held to be in *U.S. v. ex rel. Barnard v. Lane* (7th Cir. 1987) 819 F.2d 798, 802-805. The idea that trial counsel could, as a legitimate strategy, attempt to force the jury to choose between manslaughter and first-degree murder cannot withstand constitutional scrutiny. *(Ibid.)*

Second, the Magistrate Judge misquotes the California Appellate Court. That Court only opined that it was "*possible* that defense counsel wished to focus the jury's attention fully on manslaughter". (Respondent's Answer Exh. #5, p. 28 [CCOA Opinion].) This conjecture is unreasonable because it conflicts with the unequivocal finding of that same Court to the effect that "[t]he main focus of defendant's argument was that he did not plan, premeditate or deliberate the killing of Susan". (*Id.*, p. 17.) The California Court of Appeal cannot reasonably be allowed to have it both ways. (See 28 U.S.C.§ 2254(d)(2).)

Third, the Magistrate Judge seems to intimate that there is no substantial difference between a 15-to-life conviction and a 25-to-life conviction. Indeed, there is – about 10 years difference. There is a greater difference between the base term for first-degree murder and second-degree murder than there is between manslaughter and second-degree murder.

Fourth, this conjectural "all-or-nothing" approach is only reasonable to the extent that manslaughter appeared to be a reasonably achievable verdict. The Magistrate Judge's sufficiency and prejudice analysis in the case are a finding that it was not. (See R&R, pp. 31(24)-32(12), 39(27)-40(12) [i.e., Petitioner stated that he as not in fear for his life, but rather was just trying to control his wife]; RT 146, 783-785 [Petitioner's testimony].) Thus, the speculative imputation of the "all-or-nothing" approach is premised upon the idea, at least in terms of the Magistrate Judge's thinking, that trial counsel focused in folly on an unobtainable object. The jury could have acquitted Petitioner on a theory of accidental death, it could have found for second-degree murder, and it did find murder in the first-degree – but, it could not reasonably find manslaughter because there was no evidence of the sort of "objective" provocation required by CALJIC Nos. 8.42 through 8.44.

Fifth, Petitioner describes how the position taken by the California Court of Appeal, the Magistrate Judge, and respondent as to Ground #8, unwittingly concedes both prongs of *Strickland*, in Petitioner's *Traverse* at pages 80(16) through 82. Petitioner asks that this reasoning be incorporated herein by reference. In its essence, the argument stated there is as follows: If the evidence of provocation in the case was such as to raise a reasonable doubt that the killing occurred during heat of passion as defined by CALJIC Nos. 8.40/8.42-8.44, then the jury would be duty bound to vote for manslaughter regardless of whether CALJIC No. 8.73 was or was not given. The idea that trial counsel could *rationally* commit his client to a strategy based upon forcing a jury that was convinced that this was a murder, that is to say an intentional killing that occurred without "heat of passion", to nonetheless

find it to be manslaughter because they abhorred the idea of finding for first-degree murder – as the law would then require them to – is absurd. Distilled to its essence, the Magistrate Judge and the others argue that trial counsel could legitimately commit his client to a strategy based upon jury nullification of first-degree murder through a verdict of manslaughter when an available instruction would have given the jury a strong option of second-degree murder. Remember, a belief in the likelihood that the jury would, in light of CALJIC No. 8.73, find for second-degree murder is the logical precursor to this whole "all-or-nothing" strategy. Thus, shorn of all pretense, the Magistrate Judge's position is untenable. (See this argument in more detail at pp. 80-82 of the *Traverse.)*

OBJECTION #9

THE FAILURE TO INSTRUCT ON CALJIC NO. 8.73 WAS PREJUDICIAL

GROUND #9: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DENIED PETITIONER HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL IN FAILING TO INSTRUCT THE JURY IT COULD CONSIDER PROVOCATION IN DETERMINING THE DEGREE OF MURDER

A.

THE MAGISTRATE JUDGE ERRED BY SECOND-GUESSING THE CALIFORNIA COURT OF APPEAL ON A MATTER OF THE INTERPRETATION OF STATE LAW

The Magistrate Judge begins her analysis of Ground #9 by resolving a point of state law contrary to the California Court of Appeal. The Magistrate Judge notes that

Petitioner's argument "appears to be supported by the California Supreme Court's decision in *People v. Johnson*, 6 Cal.4th 1, 42-43 (1993)" but that "the California Supreme Court's decision in *People v. Saille* . . . calls *Johnson* into question." (R&R, p. 37(106).) The Magistrate Judge goes on to note that *People v. Lee* (1994) 28 Cal.App.4th 1724, 1734, [and] *People v. Middleton* (1997) 52 Cal.App.4th 19, 32-33 appear to follow *Saille*. (R&R, p.36-37.)

Under *Johnson* the California Supreme Court held that an instruction on provocation as mitigation of the deliberation element of the mens rea for first-degree murder must be given *sua sponte*. (*Johnson*, supra, at 6 Cal.4th 42-43.) The Magistrate Judge interpreted the other three cases as saying that there was no such duty, and that such an instruction must be requested. There is a grave problem with this analysis.

The State Court of Appeal considered both *People v. Lee* and *Saille* and ended up distinguishing them both:

> A critical distinction between *Saille* and the provocation defense here [i.e., in Petitioner's case] is that diminished capacity caused by voluntary intoxication was legislatively abolished. . . . . [ ] The *Saille* opinion was thus founded on the abolition of the defense. Since there has been no such abolition of the provocation 'defense' to reduce first degree murder to a second degree murder, we cannot say that *Saille* applies here. In light of *People v. Wickersham* as interpreted by *People v. Johnson,* until and unless the Supreme Court says otherwise, we must conclude that provocation to reduce a murder from first degree murder to second degree murder is a *defense requiring sua sponte instructions when there is*

> *evidence supporting the theory. Therefore, it was error not to so instruct here.*

(Respondent's Answer Exh. #5, pp. 23-24 [CCOA Opinion]; see also *Id.* at p. 20 [Court of Appeal distinguishes *People v. Lee*].)

In determining whether a violation of State law has occurred this Court must defer (in such circumstances as these) to the State's determination. *(Oxborrow v. Eikenberry* 9th Cir. 1989) 877 F.2d 1395, 1399 cert. den. 493 U.S. 942; *Aponte v. Gomez* (9th Cir. 1993) 993 F.2d 705-707; *Peltier v. Wright* (9th Cir. 1994) 15 F.3d 860, 862.) Thus, this Court must take for granted that the trial court had a sua sponte duty to instruct. Due to California's "law of the case" doctrine, it is the Court of Appeal's determination *in this case* that governs, and not the potentially varying determinations made in other cases. See *People v. Shuey* (1975) 13 Cal.3d 835, 841 [quoting *Tally v. Ganahl* (1907) 151 Cal 418, 421].)

The Magistrate Judge's learned exposition on the meaning of relevant State law is therefore trumped by the contrary determinations of the California Court of Appeal.

B.

THE MAGISTRATE JUDGE ERRED IN SECOND-GUESSING THE CALIFORNIA COURT OF APPEAL'S FACT-FINDING REGARDING TRIAL COUNSEL'S STRATEGY

The Magistrate Judge makes the following assertion:

> *The record reveals that the Trial Counsel opted for an all-or-nothing defense strategy, failing,* whether

> of neglect or plan, to request CALJIC NO. 8.73. (emphasis added)

(R&R, p. 38(14-17).) The underlined assertion above, is inconsistent with the symmetrical determination of the California Court of Appeal. While considering the state analogue to Ground #9, that Court stated:

> The main focus of defendant's argument was that he did not plan, premeditate or deliberate the killing of Susan. Defendant repeatedly questioned if there was evidence regarding premeditation and asked the jury to question it also. While defendant argued self-defense and voluntary manslaughter, he stated that the entire spectrum of homicide was in this case – 'Everything from first degree murder to second degree murder, voluntary, involuntary and self-defense'.
>
> Although defendant testified he did not intend to kill Susan, the jury could have found there was not sufficient provocation to warrant a lethal response yet also have concluded there was provocation sufficient to affect defendant's decision to kill Susan but without premeditation and deliberation. *Defendant's focus was an argument against premeditation. The provocation instruction was not inconsistent with defendant's defense.* (emphasis added)

(Respondent's Answer, Exh. #5, pp. 17-18 [CCOA Opinion]; see also Trial Counsel's summation, RT 909(16-23), 914(12)-915(6), 924(11-19), 926(3-12), 931(6)-935.)

Absent an evidentiary hearing or "clear and convincing" evidence that the Court of Appeal erred, this Court does not have the prerogative to ignore the above determination of the California Court of Appeal. (See 28 U.S.C.

§ 2254(e) and *Schell v. Witek*, supra, at 218 F.3d 1027.) When adjudicating this claim, this Court must presume that the jury instructions supporting a second-degree murder verdict were not inconsistent with the defense position. The Magistrate Judge's contrary assessment must be disregarded.

C.

THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #9 IS FLAWED

The Magistrate Judge's prejudice analysis tracks that of the California Court of Appeal. She relies on a theory that the jury instructions demarcating second-degree murder from manslaughter and first-degree murder were enough to convey the essential ideas. (R&R, pp. 38(11)-39(2).) So did the Court of Appeal. (Respondent's Answer, Exh. #5, p. 24(3-27) [CCOA Opinion].) Given the two prongs of Title 28 of the United States Code, section 2254(d), in order to prevail, Petitioner needs to prove that the Court of Appeal's determination is either an unreasonable application, or contrary to, the clearly established law of the United States Supreme Court.

1.

THE GOVERNING UNITED STATES SUPREME COURT JURISPRUDENCE

The United States Supreme Court requires that the prosecution prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *(In re Winship* (1970) 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068.) Here the prosecution unquestionably negated the type and level of provocation

that would have supported a manslaughter verdict under a theory of heat of passion. The question before this Court is whether the same is true for that level and type of provocation which, under CALJIC No. 8.73, may reduce first-degree murder to second-degree murder:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for such bearing as it may have on whether the defendant killed with or without deliberation and premeditation.

(CALJIC No. 8.73.)

Here the Court of Appeal determined that trial counsel failed to instruct the jury on a "defense" to the crime. (See Respondent's Answer, Exh. #5, p. 24 [CCOA Opinion].)

Such errors are subject to the harmless-error analysis. (*Neder v. United States* (1999) 527 U.S. 1, 12-15, 144 L.Ed.2d 35, 119 S.Ct. 1827.) An instructional omission will be found harmless where the other facts necessarily found by the jury are the functional equivalent of the omitted, misdescribed, or presumed element. (*Id.* at 15-18.) The California Court of Appeal applied California's *Watson* standard to review of the erroneously omitted instruction. (Respondent's Answer, Exh. #5, p. 24 [CCOA Opinion].) (See *People v. Watson* (1956) 46 Cal.2d 218.) The Ninth Circuit has found the *Watson* standard to be the equivalent of the *Brecht* standard. (*Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 971, fn. 2, cert. den. 513 U.S. 1037.) Thus, the State has applied the correct federal standards.

The only remaining issue is whether they were unreasonably applied.

2.

CALIFORNIA'S UNREASONABLE APPLICATION OF THE CONTROLLING FEDERAL STANDARDS

This is the crucial passage from the opinion of the California Court of Appeal:

> However, it is not reasonably probable that a result more favorable to defendant would have been reached had the trial court so instructed the jury in CALJIC No. 8.73. This is so because the jury could only find first degree murder on the instructions given if it was satisfied the clear, deliberate, premeditated intent of defendant to kill Susan 'must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation'. (CALJIC No. 8.20.) In the context of this case, *this instruction would cause the jury to determine whether defendant was so provoked by Susan that he acted under a sudden heat of passion or other condition preclusive of deliberation.* Thus, the jury was told to evaluate whether 'a sudden heat of passion or other condition' aroused in defendant *precluded* him from deliberating, which is synonymous on these facts with evaluating whether he was so *provoked* by Susan as to have not deliberated about the killing. Accordingly, the instructions given on distinguishing degrees of murder squarely placed the bearing of provocation before the jury without expressly saying 'you should consider provocation' on this issue. The jury had sufficient instruction before it to allow it to determine that any provocation

> present here was neither sufficient to arouse a heat of passion by an objective test (to reduce defendant's culpability to manslaughter) nor by an essentially *subjective* test (to reduce defendant's culpability to second degree murder).'

(See Respondent's Answer, Exh. #5, pp. 25-26 [CCOA's opinion].) (emphasis added)

The above analysis tracks that of the Magistrate Judge. (See R&R, pp. 38(11)-39(2).) There is, however, a problem – and it is pretty obvious: Why would the jury infer that provocation was, under CALJIC No. 8.20, a "condition *precluding* the idea of deliberation"? Provocation is not such an idea. The word 'preclude' means to make impossible by necessary consequence – to rule out in advance. (Webster's Ninth New Collegiate Dictionary (1989).) A man can be provoked into *deliberately premeditating* a murder. The United States has been provoked by al Queda, Osama bin Laden, and the Taliban. Does anyone doubt that we are acting deliberately and premeditatedly in response? Therefore, the California Court of Appeal's reliance on CALJIC No. 8.20 to cover the same base addressed by CALJIC No. 8.73 is "unreasonable" within the meaning of Title 28 of the United States Code, section 2254(d)(2).

None of the other instructions in the case would have filled the void created by the absence of CALJIC No. 8.73. A logical juror, noting that provocation is mentioned in the instructions, but only in terms of manslaughter (i.e., CALJIC No. 8.73), and only of the sort which would be provocation to a "reasonable person" (CALJIC No. 8.42), would infer that any other degree of provocation was irrelevant.

Also, as the California Court of Appeal admitted, CALJIC No. 8.73 establishes 'imperfect provocation' as a defense to first-degree murder, just as CALJIC No. 5.17 establishes 'imperfect self-defense' as a defense to manslaughter. (See Respondent's Answer, Exh. #5, p. 26 [CCOA Opinion acknowledging that CALJIC No. 8.73 sets an essentially subjective test"].) The concept of 'imperfect provocation' is no more deducible from the heat-of-passion instruction (CALJIC No. 8.42), then the 'imperfect self-defense' concept is deducible from the self-defense instructions. (Cf., *People v. Ceja* (1994) 26 Cal.App.4th 78, 85-87, 31 C.R.2d 475 [re: necessity of unreasonable self-defense instructions].)

Third, if CALJIC No. 8.73 is so obvious on the face of the other instructions, why did the Committee see fit to draft it? – and, why would a sua sponte duty exist to instruct upon it? (See Respondent's Answer, Exh. #5, pp. 23-24 [CCOA finds sua sponte duty to instruct on CALJIC No. 8.73].) California's finding of a sua sponte instructional duty for CALJIC No. 8.73 is inconsistent with its determination that the instruction is superfluous. This inconsistency undermines the reasonableness of its finding of harmless error.

Fourth, the absence of CALJIC No. 8.73 was likely crucial because it covers the pivotal issue in this case. Under the State's theory there was subjective provocation under CALJIC No. 8.73, not objective provocation under CALJIC No. 8.42. To see how vital CALJIC No. 8.73 was to the defense theory, one only need examine the Magistrate Judge's words. Writing to describe the sufficiency of the evidence of first-degree murder, the Magistrate Judge provides this precis:

> In this case, there was sufficient evidence by which a reasonable juror could have concluded that Petitioner's intent to kill Susan was premeditated and deliberated. Petitioner's own testimony provides sufficient evidence for the jury to find deliberation and premeditation. Petitioner testified that he put the computer cable around her head. (R.T. 732.) He testified that the cord moved down to her neck. (R.T. 734.) Counsel asked him what he did when the cord got around her neck, and Petitioner replied: 'I pulled on it.' (R.T. 735.) Trial Counsel asked if he intended to choke Susan, and Petitioner replied: 'Enough to stop [her].' (R.T. 735.) After the cable was around her neck they struggled back and forth, Susan pushing him away from her. (R.T. 737.) Petitioner testified that he applied pressure to the cable and used it to push Susan against the wall. (R.T. 740.) Reviewing this testimony, the jury could determine that during the struggle Petitioner had the opportunity to consciously choose between walking or running away from the house and his upset wife or killing her.

(R&R, pp. 39(27)-40(12).)

By the Magistrate Judge's own analysis then, an instruction informing the jury that it was within their sole discretion to consider "imperfect provocation" as mitigation of any such conscious choice, would have substantially influenced *the pivotal* determination in the case.

OBJECTION #10

THE MAGISTRATE JUDGE ERRED IN DECIDING THAT THE EVIDENCE OF FIRST-DEGREE MURDER WAS SUFFICIENT

GROUND # 10: INSUFFICIENT EVIDENCE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE EVIDENCE WAS NOT SUFFICIENT BEYOND A REASONABLE DOUBT TO SUPPORT HIS FIRST DEGREE MURDER CONVICTION.

The most striking aspect of the Magistrate Judge's analysis of the sufficiency of the State's evidence of first-degree murder is that it is inconsistent with her findings as to prejudice on Grounds #5 to #9. If one is going to describe the key elements of the State's case, you must mention the State's false motive evidence. It is simply unavoidable, and the Magistrate Judge does, deeming it "strong". (R&R, p. 40(18-20).) You must also mention the idea that the struggle and the method of Susan's death were not so quick as to foreclose premeditation – and the Magistrate Judge does. (R&R, p. 40(2-12).) However, this analysis only highlights the damage done by the failure to give the jury access to CALJIC No. 8.73 and Susan's diary. The latter would have allowed them to accurately gauge the likely intensity of the provocation. The former would have informed them of their "essentially subjective" (Respondent's Answer, Exh. #5, p. 26 [CCOA Opinion]) power to deem that provocation sufficient moral justification to mitigate a murder they believed to be deliberate and premeditated.

It is far more likely that the jury would see Petitioner's conduct as being insufficient grounds for a first-degree murder conviction if they could not reasonably

exclude the possibility that she attacked Petitioner and raged against him throughout their struggle – as Petitioner described.

The Magistrate Judge's remaining arguments on the sufficiency of the evidence are of no consequence to the adjudication of Ground #10. She mentions that the jury "could reasonably have found that Petitioner's action following the murder were evidence of his consciousness of guilt." (R&R, p. 40(18-20).) Petitioner agrees, but the jury could not reasonably have found that those actions were evidence of consciousness of guilt of *first-degree* murder. Petitioner could just as well felt guilty about killing his pregnant wife in self-defense, heat of passion, or with malice, but without deliberation.

The Magistrate Judge also asserts that Petitioner's failure to remove the computer cable draped over his shoulders before the altercation "could" reasonably be interpreted as evidence of planning. (R&R, p. 40(16-18).) Here, the Magistrate Judge blurs the line between an inference and sheer conjecture. The *Jackson v. Virginia* standard is *not* to the effect that conjecture may support a verdict, but that anything that could reasonably be called objective *proof* beyond a reasonable doubt may. Neutral witnesses testified that it was not unusual for Petitioner to have a computer cord draped around his neck while he worked on computers. (See R&R, p. 7(20-22).) One of the prosecution witnesses confirmed that Petitioner was installing a computer for Susan at their house, on the morning of her death, to serve as a home office workstation during her pregnancy. (See RT 230-232; see also RT 707-710, 724-725.)

Given the relevant evidence – not to mention CALJIC No. 2.01 – it would have been unreasonable for the jury to assume planning from what they were informed through *unchallenged* evidence was normal and habitual for Petitioner when he was working on such a task. No one would infer planning from the use of a hammer at a construction site. By the same token, this prop for the Magistrate Judge's argument must be disregarded.

The only other point made by the Magistrate Judge in favor of the sufficiency of the "planning" evidence to support first-degree murder was the idea that "Susan was killed during a time when all of the store employees were scheduled to be attending a conference out of town." (R&R, p. 40(13-15).) This observation, however, is superficial. Susan was killed at home. It scarcely mattered whether the store employees were at work or out of town. Further, to suggest that Petitioner planned the murder to coincide with the worker field trip is to posit planning that outstrips the State's timeline. The State argued that the timing of the killing related to Susan's unexpected discovery of Petitioner's Fourth Step. (RT 892(10-13), 944(10-13), 947(2).) Finally, given the State's motive theory, if Petitioner had this planned for days, it would mean Susan knew of the Fourth step for days – and told no one. Her silence would then logically have vitiated Petitioner's motive, diminishing fear of divorce, business dislocations, etc.

CONCLUSION

(AS TO GROUND #10)

Petitioner states his case on the insufficiency of the evidence in the *Traverse*. (See Traverse, pp. 84-93.) Given

the *de novo* review afforded the case in light of this *objection*, Petitioner knows that the Traverse will receive the Court's attention.

Here Petitioner wants most to emphasize the inconsistency between the Magistrate Judge's analysis under Ground #10 and her prejudice analysis for Grounds #5 to #9. If the primary ideas supporting the sufficiency of the evidence – even by the Magistrate Judge's reckoning – are propositions that only appeared reasonable due to trial counsel's ineffectiveness, then Petitioner has proved prejudice under *Strickland* for Grounds #5 through #8 and *Brecht* for Ground #9. How can Petitioner's extra-record evidence negating motive and establishing Susan's pent-up fury be of no consequence, when that evidence seriously undermines the Magistrate Judge's justification for the verdict?

Conclude, therefore, that if the evidence was sufficient, it was because of the cumulative effect of trial counsel's errors as described in Grounds #1, #2, #3, #5, #6, #7, and #8.

OBJECTION #11

THE MAGISTRATE JUDGE FAILED TO CONDUCT APPROPRIATE CUMULATIVE ERROR ANALYSIS

"The Ninth Circuit has recognized the principle that even if no single error is sufficiently prejudicial to issue a writ of habeas corpus, the cumulative effect of several errors may warrant relief." (E.g., *Turner v. Duncan* (9th Cir. 1998) 158 F.3d 449, 457; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 613, 622, cert. den. 507 U.S. 951.) Most of the cases applying the cumulative error principal were ones in

which there were errors, but the errors were individually found to be harmless or not prejudicial. (See above authorities.) It is also recognized that cumulative error analysis is appropriate for claims brought under *Strickland v. Washington*. (*Harris v. Wood*, supra, at 1438-1439.)

Petitioner placed the cumulative error issue squarely before the Magistrate Judge. (See Traverse, pp. 93-96.) Petitioner submits that the combined effect of Grounds #1 through #10 of the federal petition was to render the trial process unreliable.

OBJECTION # 12

PETITIONER WAS ENTITLED TO DE NOVO REVIEW ON FEDERAL GROUNDS #1 THROUGH #7 NOTWITHSTANDING TITLE 28 OF THE UNITED STATES CODE, SECTION 2254(d)

It is unclear from the Report and Recommendation the extent to whether the Magistrate Judge reviewed Grounds #1 through #7 of the Second Amended Federal Petition de novo, or whether it believed that it was proper to analyze these Grounds in light of Title 28 of the United States Code, section 2254(d). In his *Traverse*, Petitioner demonstrated that no deference could be given the State's denial of these claims under section 2254(d) because it was unclear from the terms of the State denial which claims had been denied on procedural grounds and which (if any) had been denied on the merits. (See Traverse, pp. 21-28.) Inasmuch as the Magistrate Judge did not respond to that analysis, and further, since her analysis of Grounds #1 to #7 gives no indication that deference under section 2254(d) was being assigned, Petitioner reserves his Objection on this point and reasserts it.

CONCLUSION

As the prosecutor conceded, the central issue of Petitioner's trial was whether or not he premeditated and deliberated upon Susan's death. (RT 901(15-17).) The State's evidence bearing upon this issue of mens rea was scant – so much so that the prosecutor conceded that the trial came down to whether or not the jury believed Petitioner's testimony:

> The question to resolve is whether in fact [Susan's] death was by accident, accidental means as the defendant has told you, and would like you to believe, or whether it was an intentional killing. If you believe the defendant, then you should acquit him, it's that simple. You believe him or you don't believe him. If you do believe him, then you should acquit him. If this was an accidental death, then walk him. . . . . .
> This case is polar: you believe him, acquit him, if you don't, he is guilty of murder.

RT 900(7-14), 901(13-14) [summation of Prosecutor Kams].)

The Fifth District Court of Appeal also acknowledged the pivotal role of petitioner's credibility in the case:

> While defendant's version of what happened may fit in with the evidence presented at trial and support a finding of less than first degree premeditated and deliberate murder, *if the jury determined that defendant's testimony was not credible*, the People's version of first-degree murder was also supported by the evidence.

(Respondent's Answer, Exh. #5, p. 11 [CCOA Opinion].) (emphasis added)

The fact that the jury requested readback of Petitioner's entire testimony during deliberations is evidence that they too felt that the case presented a close question, turning on the plausibility of Petitioner's "sole-eyewitness" account. (See RT 189, 986-90; *People v. Williams* (1971) 22 Cal.App.3d 34, 39-40 [juror request for readbacks used as indicia, of the closeness of a case].) Further analysis of the record reveal that the jury must have returned their verdict within minutes of the completion of this readback. See Memo of P&A in support of Second Amended Federal Petition, pp. 73-74.)

The prosecution did not present any evidence or statements that were irreconcilable with Petitioner's innocence of first-degree murder. What, after all, did the state's case consist of? There was not a shred of direct evidence that the murder was planned. And there was only a single statement attributed to Petitioner which was indicative of malice aforethought. This was the statement attributed to Petitioner by a disgruntled employee, Dale Shimono, to the effect that "sometimes" Petitioner thought he would be better off if his wife was dead and dumped in a field. (RT 235-236, 239-251.) Admittedly, it was a macabre thought, and beyond the pale at that, but it is rather meager evidence of premeditation when considered in context of substantial evidence showing that Petitioner was quite even tempered with Susan, that he had a character trait for nonviolence, and the superficiality of the people's motive theory – especially when these factors are weighed in light of the State's burden to prove their case beyond a reasonable doubt.

Assuming arguendo that Petitioner made this statement, he did so months before Susan's death, during a time of marital difficulties and separation from his wife.

(*Ibid.*) Nothing in Petitioner's past suggests that the remark was indicative of anything other than emotional exhaustion and bitterness at being rejected by his wife. The State could not produce a single witness that could testify that Petitioner ever said something of that cruelty to Susan's face. Indeed, the State could not find a single witness that Petitioner had ever struck her or ever raised his voice during any of the "disputes" and "arguments" between the Kurtz's which were described to the jury. (RT 199, 234-235, 678-679.) Even Susan's "diary" does not describe verbal *or* physical abuse at the hands of her husband. (Exh. 910 to P&A in support of Second Amended Federal Petition.) And, one scours the transcripts in vain if one hopes to find evidence of an argument between the Kurtz's falling within the two months preceding Susan's death. Why? Because the prosecutor left uncontradicted Petitioner's evidence that his wife and he had reconciled their differences in a shared joy at two blessings that had come into their life. First, that Susan had become pregnant with their second child. (RT 131-132, 755.) And second, that Petitioner had been winning the war against drugs and alcohol. He had been clean for over nine months at the time of Susan's death. (RT 132-133, 167, 173-174, 658-659.)

So where then is Petitioner's case for first-degree murder? The only other circumstantial evidence of what Petitioner's state of mind was when he was fighting[2] with his wife, was the evidence that suggested *both* manual and ligature strangulation had occurred during the struggle.

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[2] And a fight it must have been. Petitioner was seen limping afterwards and had bite marks on his hands. (RT 728-730, 801-802.)

(RT 345-347, 361.) This suggested a certain fixity of purpose but offers us an infirm basis to find for murder-one as opposed to murder in the second degree.

In the same way, no amount of post-death prevarication and dissimulation on Petitioner's part can tell us whether the inferred "consciousness of guilt" was consciousness of guilt for first-degree murder, second-degree murder, or of manslaughter.

In context then, the evidence related to motive is extremely important. How else, on this record, could the jury reasonably infer, beyond a reasonable doubt, that Petitioner's act was premeditated and deliberated? Thus, a true injustice was worked by Smith's failure to demonstrate that the people's motive theory was specious. Petitioner, wholly independent of the community property, was a millionaire. (See Ground #5, supra.) His lifestyle could not be crimped by his wife's *request*, which he granted, to have sole control of the checking account. (*Ibid.*) Nor, was Petitioner in a cold sweat over the prospect of being exposed to "the community" as a felon and a drug user. Petitioner had long since confessed his past to the congregation of his church, and judging from the trial, everyone else he knew. (*Ibid.*)

In the same vein, one tries without success to justify Smith's failure to present direct evidence of Susan' state of emotions when she examined in October 1992 the "rage" and "anger" that were invoked in her at even the *thought* that her husband might lave been unfaithful to her. (See Ground #6, supra.) From this evidence the jury would have been forced to concede that Susan was very likely to come "unhinged" and assault Petitioner should her darkest fears be realized. (*Ibid.*) This unprofessional lapse very

clearly altered the outcome of the case, and by itself, brought a first-degree conviction within reach of the prosecution. In the context of the State's evidence, only a jury secure in the belief that Susan would *never* lash out in anger could have conscientiously rejected Petitioner's otherwise unimpeached story of their confrontation.

Given the structure of this case, prejudice must also be assigned to Smith's mismanagement of Petitioner's confidences and secrets. In all, Smith exposed the substance of three attorney/client conferences to the jury, and arguably, the most important ones at that. (See Grounds #1, #2, and #3, supra.) Through these revelations the police were able to locate the body and make a case sufficient to arrest and try Petitioner. In addition, through these revelations the jury learned that Petitioner's ultimate explanation for his wife's death was prompted by his attorney's opinion that the "suicide" story did not wash. This suspicious reversal of Petitioner's field, and to a substantial degree the suicide story itself, only came before the jury as a result of Smith's failure to properly manage his client's privilege. (*Ibid.*)

The Claims in Grounds #1 to #3 are not merely the "tears of the crocodile". It was the chilling effect on his client of Smith's mismanagement of privileged information early in the relationship that was the proximate cause of the delay in Petitioner's disclosure of his fight with his wife. (See Ground #2, supra.) In addition, it was Smith's mismanagement of privileged information which resulted in the fact that the jury never heard the complete explanation for Petitioner's conduct after the death of his wife. (*Ibid.*) Thus, the ramifications of Smith's unethical conduct became factors in the jury's evaluation of Petitioner's credibility.

This case does not present the sort of miscarriage of justice which brings media coverage and a tearjerking story in Reader's Digest. Nonetheless, a real injustice has been worked in this case. Backing out the affect of Smith's wanton mismanagement of his client's privilege, and considering how the trial would have looked if readily available evidence vindicating Petitioner from having any motive to kill his wife and demonstrating the latency of Susan's rage towards him was presented, one inexorably reaches the conclusion that a man was wrongfully convicted of *first*-degree murder.

The evidence legitimately before the jury coupled with the complete picture on the issue of motive and Susan's state of mind, significantly alters the picture of Petitioner's credibility, his motive in withholding for so long his story about his wife's death, and his state of mind at the time of her death. It can be said that but for the complained errors arising from trial counsel's ineffectiveness there is a reasonable possibility of a different outcome. It can also be said that Smith's conduct with respect to his client's secrets was egregious and that it fundamentally corrupted the attorney/client relationship. Smith's conduct resulted in an attorney/client relationship unworthy of that designation – one that controverted Petitioner's rights under both the Sixth and Fourteenth Amendments to the United States Constitution. (See Ground #2, supra.)

Respectfully submitted,

November 12, 2001 /s/ William E. Gilg,
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT M. KURTZ, Petitioner, vs. ROBERT AYERS, Warden and CAL TERHUNE, Director of California Department of Corrections, Respondent.	Case NO. CV F 97-6201 AWI SMS P EXHIBIT LIST IN SUPPORT OF PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION OF AUGUST 8, 2001 [28 U.S.C. {636] U.S. Magistrate Judge Sandra M. Snyder

EXHIBIT #1: ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS, CANNON 4 & ETHICAL CONSIDERATIONS

EXHIBIT #2: LEXISNEXIS, CALIFORNIA CRIMINAL DEFENSE PRACTICE, SECTION 1.13 "INITIAL CLIENT INTERVIEW

EXHIBIT #3 ABA MODEL RULES OF PROFESSIONAL CONDUCT, COMPENDIUM OF

PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS, RULE 1.6: CONFIDENTIALITY OF INFORMATION

November 12, 2001

/s/ William E. Gilg
WILLIAM E. GILG,
Attorney for Petitioner

EXHIBIT #1 TO OBJECTIONS

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY,

COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS,

CANNON 4 & EHTICAL CONSIDERATIONS

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980.

CANON 4
A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal

system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his

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[1] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANONS 6 and 37 (1908) and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in MECHEM ON AGENCY, 2d Ed., Vol. 2, § 2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice shall be strictly privileged; – that the attorney shall not be permitted, without the consent of his client, – and much less will he be compelled – to reveal or disclose communications made to him under such circumstances.' *ABA Opinion* 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F.Supp. 917, 919 (D.N.J. 1958).

Cf ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential

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[2] "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer." Baird v. Koemer, 279 F.2d 623, 629-30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1936).

[3] "Where . . . [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information." *ABA Opinion* 320 (1968)

professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.[4] Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care

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[4] "The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him.... [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession." WILLISTON, LIFE AND LAW 271 (1940).

Cf. ABA Opinions 177 (1938) and 83 (1932).

in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.[5] Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.[6] Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another,[7] and

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[5] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 11 (1908).

[6] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908).

[7] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANONS 6 and 37 (1908).

"[A]n attorney must not accept professional employment against a client or a former client which will, or even may require him to use confidential information obtained by the attorney in the course of his

(Continued on following page)

no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.[8] Thus a lawyer should not attempt to sell a law practice as a gong business because, among other reasons, to do so would involve the disclosure of confidences and secrets.[9] A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

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professional relations with such client regarding the subject matter of the employment. . . ." *ABA Opinion* 165 (1936).

[8] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908).

"Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney's employment. *Canon 37.*" *ABA Opinion* 154 (1936).

[9] *Cf. ABA Opinion* 266 (1945).

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.[11]

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[10] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908); *cf.* ABA CANONS OF PROFESSIONAL ETHICS, CANON 6 (1908).

[11] "§ 6068 . . . It is the duty of an attorney:

. . . .

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client. CAL. BUSINESS AND PROFESSIONS CODE § 6068 (West 1962). Virtually the same provision is found in the Oregon statutes. ORE. REV. STATS. ch. 9 § 9.460(5).

"Communication between lawyer and client are privileged (WIGMORE ON EVIDENCE, 3d Ed., Vol. [illegible] §§ 2290-2329). The modem theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, § 2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, § 2294, p. 563). The mere circumstance that the advice is given without charge therefor does not nullify the privilege (*ibid.*, § 2303)." *ABA Opinion* 216 (1941).

(Continued on following page)

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself[12] or of a third person,[13] unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[14]

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.[15]

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client. . . ." *ABA Opinion* 155 (1936).

[12] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 11 (1908).

"The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit (7 C.J.S., § 125, p. 958, Healy v. Gray, 184 Iowa 111, 168 N.W. 222; Baumgardner v. Hudson, D.C. App., 277 F. 552; Goodrum v. Clement, D.C. App., 277 F. 586)" *ABA Opinion* 250 (1943).

[13] *See ABA Opinion* 177 (1938).

[14] "[A lawyer] may not divulge confidential communications information, and secrets imparted to him by the client or acquired during their professional relations unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178; Murphy v. Riggs, 238 Mich. 151, 213 N.W. 110, 112; Opinion of this Committee, No. 91)." *ABA Opinion* 202 (1940).

Cf. ABA Opinion 91 (1933).

[15] "A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client's whereabouts as a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

"It is the opinion of the committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities. . . ." *ABA Opinion* 155 (1936).

"We held in Opinion 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

. . . .

"When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant is not privileged from disclosure. . . ."

See ABA Opinion 156 (1936).

(3) The intention of his client to commit a crime[16] and the information necessary to prevent the crime.[17]

(4) Confidences or secrets necessary to establish or collect his fee[18] or to defend himself or his employees or associates against an accusation of wrongful conduct.[19]

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[16] *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

See ABA Opinion 155 (1936).

[17] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908) and *ABA Opinion* (1940).

[18] *Cf. ABA Opinion* 250 (1943).

[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908) and *ABA Opinions* 202 (1940) and 19 (1930).

"[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

"The exception is stated in MECHEM ON AGENCY, 2d Ed., Vol. 2, § 2313, as follows: 'But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.'

"Mr. Jones, in his COMMENTARIES ON EVIDENCE, 2d Ed., Vol. 5, § 2165, states the exception thus: 'It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of

(Continued on following page)

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

CANON 5
A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.[1] Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a

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privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.'" *ABA Opinion* 250 (1943).

reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.[2] After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EXHIBIT #2 TO OBJECTIONS

LEXISNEXIS, CALIFORNIA CRIMINAL DEFENSE PRACTICE, SECTION 1.13 "INITIAL CLIENT INTERVIEW"

DOES NOT CIRCULATE

CALIFORNIA
CRIMINAL DEFENSE
PRACTICE

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SEARCH AND SEIZURE

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§ 1.13 Initial Client Interview

IF THE CLIENT IS INCARCERATED, THE INITIAL INTERVIEW SHOULD BE CONDUCTED IN THE JAIL AS SOON AS POSSIBLE.[1] IN CONDUCTING THE INTERVIEW, COUNSEL SHOULD KEEP CERTAIN OBJECTIVES IN MIND.[2] A RECORD SHOULD BE KEPT OF ALL INTERVIEWS.[3]

[1] Incarcerated Client

An incarcerated client should be seen as soon as possible after the attorney is retained. If possible, the client should be warned beforehand not to talk to anyone or waive any rights until he or she has met with counsel. In addition, the arresting officer or person in charge of the

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[1] *See* [1], *below*.

[2] *See* [2], *below*.

[3] *See* [3], *below*.

jail should be contacted and told that the client is not to be interrogated in the attorney's absence.

By statute, an attorney has the right to visit with a prisoner,[4] even before booking is completed.[5] To protect the client's rights, counsel should arrange for this visit as soon as possible and conduct the interview in a private room in the jail. At the interview, counsel should obtain the client's story, warn the client not to waive his or her rights or discuss the case with anyone, including other prisoners, and obtain the necessary information to have the client released on bail or on his or her own recognizance. Obtaining release from incarceration is discussed in Chapter 12, "Bail."

[2] Objectives of Initial Interview

[a] Importance of Interview

The initial interview or interviews with a client generally provide the most significant opportunity for learning the facts of the case and establishing a relationship of trust between the attorney and client. In conducting these interviews, counsel should bear in mind the objectives discussed in the subsections below, adapting them to his or her personal style and approach. At this early stage, a fee agreement should also be reached, as

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[4] Penal Code § 825 (officer who refuses or neglects to permit attorney visitation is guilty of misdemeanor); *see* Beltram v. Appellate Dept. (1977) 66 Cal. App. 3d 711, 716-717, 136 Cal. Rptr. 211 (jailer liable to defendant for refusing her request to see attorney).

[5] Beltram v. Appellate Dept. (1977) 66 Cal. App. 3d 711, 716, 136 Cal. Rptr. 211.

discussed in § 1.12, *above*. Counsel should prepare carefully for the interview, obtaining copies of the client's rap sheet and relevant police reports and ascertaining the precise nature of the charges that have been or will be filed against the client.

If the client is not familiar with the criminal justice system, counsel should explain the salient features and how they will apply. The client will be particularly interested in his or her role at the hearing or trial, in possible sentences, and in the possibility of plea bargaining.

Counsel should regularly contact the defendant and keep him or her informed as to the status of the case, new findings or information which may develop, strategies to be employed in the defense, plea bargaining offers made by the prosecution, and similar information.

[b] Establishing Proper Attorney-Client Relationship

Perhaps the most important objective of the initial interview is to establish the proper attorney-client relationship. The attorney must strive to develop a climate of trust by explaining the attorney-client privilege, pointing out that a successful outcome requires that the attorney know all the facts, and conducting the interview in a manner that inspires confidence and trust.

However, the attorney must make it clear that he or she is in charge of the defense and of trial tactics and strategy, while emphasizing that the client will be kept fully informed as the case proceeds.

[c] Eliciting Facts

One of the most important objectives of the interview is to elicit the facts of the case from the client. When attempting to elicit the client's version of the facts, it is advisable to use broad, open-ended questions and avoid leading questions. The discussion should be guided, when necessary, but suggestion of desired answers must be avoided. In interviewing a client who is reluctant to come forth with the facts, counsel must walk a fine line between forceful interviewing and the third degree. However, it is vital that all internal inconsistencies in the client's story and inconsistencies with the police version of the facts be investigated. It should be stressed to the client that it is much better to reveal harmful facts to defense counsel than to have them surprise counsel at trial.

[d] Warnings to Client

It is vital for counsel to impress upon the client the necessity of not discussing the case with anyone, including police officers, jailers, fellow inmates, doctors, friends, relatives, or members of the press.

The client should be warned that it is common for inmates to relay information learned through casual conversation to the authorities, in order to bargain with the prosecutor for preferred treatment. Furthermore, counsel should advise the client of the possibility that the authorities may seek to discuss the case, under the guise of clarifying certain matters or casual conversation. Additionally, the client should be warned that letters

mailed from the jail may be opened and read by jail authorities.[6]

The client should also be warned not to make any statements or sign any papers of any kind without first demanding to consult with counsel. In addition, counsel should insist that the client not do any of the following:

(1) Participate in any lineup or showup without the presence of counsel;

(2) Agree to take a polygraph test; or

(3) Agree to give blood samples or other body specimens.

[3] Keeping Record of Interview

Counsel should keep an accurate record of the initial interview and the client's version of the facts. This can be done by taking detailed notes of the interview or by dictating the important points of the interview after its close.

In some circumstances, defense counsel may want to use a portable tape recorder to preserve a record of client interviews. The advantage of tape-recording is that a transcript of the recorded interview can be included in the case file and reviewed by the client. The client can then

---

[6] *See, e.g.,* People v. Holzer (1972) 25 Cal. App. 3d 456, 461-463, 102 Cal. Rptr. 11, *disapproved on other grounds in* People v. Palmer (2001) 24 Cal. 4th 856, 103 Cal. Rptr. 2d 13, 15 P.3d 234 (where evidence obtained from censored mail was suppressed at trial, the improper censorship was not grounds for reversal on appeal).

furnish additional information, fill in gaps, explain inconsistencies, and clarify or correct ambiguous or false information. The recording can also be used to protect against later claims of ineffective representation or charges levied by the prosecutor of obstruction of justice. The disadvantage of tape-recording is that the presence of a tape recorder may undermine the confidence of the client and interfere with obtaining necessary information. If counsel determines that his or her client may be intimidated by the presence of a tape recorder, it should not be used.

EXHIBIT #3 TO OBJECTIONS

ABA MODEL RULES OF PROFESSIONAL CONDUCT,

COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS,

RULE 1.6: CONFIDENTIALITY OF INFORMATION

ABA MODEL RULES OF PROFESSIONAL CONDUCT

The ABA Model Rules of Professional Conduct, including Preamble, Scope, Terminology and Comment, were adopted by the ABA House of Delegates on August 2, 1983, and amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997 and 1998.

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RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

> **(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or**
>
> **(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.**

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

* * *

public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished.

[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous

purpose will actually be carried out, for the client may have a change of mind.

[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the

lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending

against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[20] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision

of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Model Code Comparison

Rule 1.6 eliminates the two-pronged duty under the Model Code in favor of a single standard protecting all information about a client "relating to representation." Under DR 4-101, the requirement applied to information protected by the attorney-client privilege and to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b) redefines the exceptions to the requirement of confidentiality. Regarding paragraph (b)(1), DR 4-101(C)(3) provided that a lawyer "may reveal [t]he intention of his client to commit a crime and the information necessary to prevent the crime." This option existed regardless of the seriousness of the proposed crime.

With regard to paragraph (b)(2), DR 4-101(C)(4) provided that a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Paragraph (b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee; for example, recovery of property from the client.

APPENDIX P

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT M. KURTZ, Appellant/Petitioner, vs. ROBERT AYERS, Warden and CAL TERHUNE, Director of California Department of Corrections, Appellee/Respondent.	Case NO. CV F 97-6201 AWI SMS P APPELLANT/ PETITIONER'S NOTICE OF APPEAL [F.R.A.P., Rule 4] (Filed Sep. 9, 2002)

TO THE HONORABLE ANTHONY W. ISHII, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AND TO THE HONORABLE SANDRA M. SNYDER, U.S. MAGISTRATE JUDGE:

Appellant/Petitioner Robert M. Kurtz hereby appeals from the judgment denying his habeas corpus petition on August 14, 2002.

September 6, 2002 /s/ William E. Gilg
WILLIAM E. GILG
Attorney for Appellant/
Petitioner

APPENDIX Q

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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

ROBERT M. KURTZ, Appellant/Petitioner, and ROBERT AYERS, WARDEN Appellee/Respondent	)))))))	Case No.: 02-16843 Dist Ct No. CV F-97-06201 AWI [Circuit Rule 22-1]

MOTION FOR A CERTIFICATE OF APPEALABILITY

(Filed Oct. 21, 2002)

Exhibits To Be Filed Separately

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ROBERT M. KURTZ, Appellant/Petitioner, and ROBERT AYERS, WARDEN Appellee/Respondent.	Case No.: 02-16843 Dist Ct No. CV F-97-06201 AWI [Circuit Rule 22-1]

MOTION FOR A CERTIFICATE OF APPEALABILITY

Exhibits To Be Filed Separately

JURISDICTIONAL STATEMENT

This is a motion for a certificate of appealability pursuant to Circuit Rule 22-1. The final judgment denying the underlying habeas petition was entered by the District Court on August 14, 2002 and a certificate of appealability

was refused by order entered on September 18, 2002. Subject matter jurisdiction for the District Court was conferred by Title 28 of the United States Code section 2254(a). Jurisdiction in this Court is conferred by Title 28 of the United States Code sections 1291 and 2253.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

For the purposes of this motion, appellant/petitioner directs the Court to the Statement of the Case, and the facts thereof, given by the District Court in its Report and Recommendation. (See Exhibit 'A' to this Motion[1], pp. 1-7; contained also in the Record on Appeal, as forwarded by the District Court.)

REVIEWABILITY AND STANDARD OF REVIEW

Federal appellate courts review habeas corpus decisions de novo. (*Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149, cert den. 121 S.Ct. 277, 148 L.Ed.2d 202 (2000).) Factual findings of the district court are presumed to be correct unless clearly erroneous. (*Ibid.*)

In order to win a certificate of appealability as to any of the 10 claims of his federal petition, appellant/petitioner must demonstrate a substantial showing of the denial of a constitutional right. (28 U.S.C. § 2253(c)(2).) The United States Supreme Court has elucidated this standard as follows: "[O]bviously the petitioner need not show that he

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[1] All cited exhibits accompany this Motion for a Certificate of Appealability unless otherwise indicated.

should prevail on the merits. He has already failed in that endeavor." Nevertheless, a certificate of appealability must issue if the appellant presents a question of some substance, that is, at lease one issue that is: (1) debatable among "jurists of reason"; (2) that a court cold resolve in a different manner; (3) that is "adequate to deserve encouragement to proceed further"; (4) that is not squarely foreclosed by statute, rule, or authoritive court decision; or (5) that is not lacking any factual basis in the record. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 893, fn. 4, 77 L.Ed.2d 1090, 103 S.Ct. 3383, 3394, fn. 4; *Slack v. McDaniel* (2000) 529 U.S. 473, 483-484, 146 L.Ed.2d 542, 120 S.Ct. 1595; 28 U.S.C. § 2253(c) [codifies the *Barefoot* standard].)

ARGUMENT

I

THE RESOLUTION OF GROUNDS 1 TO 3[2] OF THE HABEAS PETITION TURN ON A QUESTION OF LAW WHICH THE SUPREME COURT HAS IDENTIFIED AS OPEN OR "UNRESOLVED"

It is well recognized that a certificate of appealability should be granted if a pivotal legal issue in the case has been identified by the United States Supreme Court as "open", "unresolved", or a matter of disagreement among different circuit courts. (See Vol. 2, Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (4th Ed. 2001) § 35.4c, fns. 66 & 67, pp. 1590-1591 [citing cases].)

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[2] See Exhibit 'B' (2nd Amended Petition) pp. 8-9 (Ground 1), pp. 10-11 (Ground 2), p. 12 (Ground 3).

Grounds 1 to 3 of the habeas petition were resolved on the District Court's belief that, *as a matter of law*, material, unauthorized, disclosures of inculpatory client communications by a defense attorney do not constitute "prima facie evidence of unreasonable or incompetent assistance of counsel". (Exhibit 'A' (R&R)[3], p. 13(8-11).) The lower court reached this conclusion after declaring itself unable to "find any statement of law which holds, that counsel has an affirmative duty to inform his client of the protections of attorney-client privilege before seeking consent to disclose the privileged information". (*Id.* at p. 13, fn. 5.)

In *Nix v. Whiteside* (1986) 475 U.S. 157, 165-166, 89 L.Ed.2d 123, 134, 106 S.Ct. 988, the United States Supreme Court also observed that the pivotal issue identified by the lower court remains open:

> Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. **In some future case challenging attorney conduct in the course of a state-court trial, we may**

[3] R&R refers to the District Court's Report and Recommendation in this matter.

> **need to define with greater precision the weight to be given to recognized cannons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.** (emphasis added)

(*Nix v. Whiteside*, supra, at 475 U.S. 165-166.)

Petitioner's trial attorney violated several "cannons of ethics" and "standards established by. . . . Statutes [and] professional codes" when he disclosed without due consultation and authorization the location of Susan Kurt's body. (See Cal. Bus. & Prof. C § 6068(e); Cal. Evid. C § 912(a), 953-955; ABA Ethical Cannon 4; ABA Ethical Consideration, EC 4-4'; ABA Compendium of Professional Responsibility Rules & Standards, DR 4-101; Model Rules of Professional Conduct (1998) § 1.6.)[4] Neither the lower court, nor respondent, has disputed the fact that if appellant/petitioner's factual allegations are true, his attorney violated those cannons, statutes, and professional codes. In addition, it is undisputed that the attorney/client privilege was created to vindicate core objectives of the Sixth Amendment provision of right to counsel.[5] Given

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[4] See Exhibit 'C' (Objection), at Ex. #l, pp. 2-4, and Ex. #3, pp. 4-7.

[5] The attorney/client privilege is central . . . "to the proper functioning of our adversary system of justice." (*U.S. v. Zolin* (1989) 491 U.S. 554, 562, 105 L.Ed.2d 469, 109 S.Ct. 2619, 2626.) Respect of the privilege is vital "if the professional mission is to be carried out". (*Upjohn v. United States* (1981) 449 U.S. 383, 389, 66 L.Ed.2d 584, 101 S.Ct. 677, 682.) The "sound[ness] [of] legal advice . . . depends upon the lawyer being fully informed by the client". (*Ibid.*) "If the client knows that damaging information could more readily be obtained from the attorney . . . [a] client would be reluctant to confide in his lawyer and it

(Continued on following page)

these circumstances, this case presents exactly the question that the United States Supreme Court reserved in *Nix v. Whiteside*.

The *Nix* Court did not have to reach that question because it held that Whiteside's attorney **had not violated the ethical cannons of his profession in forestalling his client's perjury**. (*Nix. v. Whiteside*, supra, at 475 U.S. 171 ["Robinson's representation of Whiteside falls well within accepted standards of professional conduct. . . ."] (*Ibid.*) This holding ineluctably led to the Court' disposition of Whiteside's petition:

> The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstances may a lawyer either advocate or passably tolerate a client's giving false testimony considering Robinson's representation. . . . **In light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel**. (emphasis added)

(*Id.* at 475 U.S. 170-171.)

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would be difficult to obtain fully informed legal advice". (*Fischer v. United States* (1976) 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569, 1577.) The "Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented **only** if a criminal defendant knows that his communications with his attorney are private. . . . " (emphasis added) (*Weatherford v. Bursey* (1977) 429 U.S. 545, 554, fn. 4, 51 L.Ed.2d 30, 97 S.Ct. 837.)

Given this reasoning, it can be confidently inferred that the United States Supreme Court would find the facts of appellant/petitioner's case probative of the legal question they reserved in *Nix v. Whiteside* for "some future case". (*Id.* at 475 U.S. 165-166.) Trial counsel in appellant/petitioner's case did not confront a situation in which his client indicated that he intended to perjure himself. Rather, trial counsel precipitously, and without the express or informed approval of his client, revealed large chunks of his client's privileged communications. (See Exhibit 'C' (Objection to R&R of 11/13/01) at pp. 6-17.)

Other evidence of the importance of the legal issue reserved in *Nix v. Whiteside*, and the plausibility of appellant/petitioner's position thereon, can be found in *U.S. v. Alexander* (9th Cir. 2002) 287 F.3d 811. In that case, Alexander alleged that his Sixth Amendment right to counsel was violated when his attorney testified before a grand jury **to statements made by Alexander** threatening violent action against others. The claim was denied after the Ninth Circuit determined that the statements were not privileged. (*Id.* at 816, 821.) However, crucially, the Ninth Circuit did not dispute the idea that disclosure of privileged communications **would** state, prima facie, a violation of the Sixth Amendment. (*U.S. v. Alexander*, supra, at 816-817.)

As for the issue of prejudice, that is the second prong of the *Strickland v. Washington* standard, appellant/petitioner has a tenable claim to a per se standard of reversal with respect to Grounds 1 to 3. (See Exhibit 'C' (Objection) pp. 22(27)-24(13), 32-33.) Other circuit courts have applied a per se standard of reversal in instances where improper conduct directly chills free communication and the structural underpinnings of attorney/client

confidence. (See *United States ex rel Wilcox v. Johnson* (3rd Cir. 1977) 555 F.2d 115, 122; *Lowrey v. Cardwell* (9th Cir. 1978) 575 F.2d 727, 730-732; *Frazer v. U.S.* (9th Cir. 1994) 18 F.3d 778, 780, 785.)

In addition, though the Eighth Circuit's decision in *Whiteside v. Scurr* (8th Cir. 1984) 750 F.2d 713, 714, was reversed in *Nix v. Whiteside*, supra, the Supreme Court did not take issue with the Eighth Circuit's holding that "[t]he lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client." (*Whiteside v. Scurr*, supra, at 714.) Rather, the Supreme Court reached a different result on a different interpretation of the underlying facts. The Court pointedly observed that Whiteside's attorney "divulged no client communications **until he was compelled to do so in response to Whiteside's post-trial challenge** to the quality of his performance." (emphasis added) (*Nix v. Whiteside*, supra, at 475 U.S. 172.) The United States Supreme Court also noted that Whiteside did testify. (*Ibid.*) Thus, the Supreme Court overruled the Eighth Circuit, but not because the Eighth Circuit's legal conclusion equating a willful and unauthorized breach of the attorney/client privilege with a violation of the Sixth Amendment was wrong. That question, as noted earlier, was left unresolved by the Supreme Court. Thus, appellant/petitioner offers the holding of the Eighth Circuit in *Whiteside v. Scurr* as additional evidence that reasonable jurists might find the issue (that is whether the unauthorized disclosure of material attorney/client communications violates a defendant's Sixth Amendment's right to counsel) "adequate to deserve encouragement to proceed further".

CONCLUSION: The lower court, in the course of adjudicating Grounds 1 to 3 of the habeas petition, twice

noted that it was "accepting, without finding" that trial counsel's performance was objectively unreasonable. (See Exhibit 'A' (R&R) pp. 18(24-25), 19(19-20).) The lower court found that Ground 3 stated a "potential conflict". (See Exhibit 'A' (R&R) p. 25(12-13).) The lower court declared trial counsel's approach to defending appellant/petitioner through surprise disclosures of core attorney/client communications, "unorthodox". (See Exhibit 'A' (R&R) p. 21(8-10).) Thus, the terms of the District Court's own assessment of the issues do not suggest that appellant/petitioner's position is frivolous or untenable.

Through Grounds 1 to 3, appellant/petitioner presented a unique set of facts, which tap into an important issue **expressly reserved** by the United States Supreme Court. While no court has squarely decided the issue, that fact, in and of itself, supports appellant/petitioner's prayer for a certificate of appealability. Further consideration of Grounds 1 through 3 may well serve a greater purpose, that is the resolution of an intriguing legal question – regardless of whether the appeal leads to relief for appellant/petitioner. Surely, the habeas statutes' certification requirement was not meant to foreclose such an appeal.

II

GROUNDS 5 TO 8[6] GIVE ADDITIONAL SUPPORT TO APPELLANT/PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

Possibly the most telling observation that can be made about trial counsel's performance is that trial counsel

[6] See Exhibit 'B' (2nd Amended Petition) pp. 15-16 (Ground 5), pp. 17-18 (Ground 6), pp. 19-20 (Ground 7), p. 21 (Ground 8).

himself found it unprofessional and incompetent. In the *Notice of Appeal* filed by trial counsel, he charged himself with three counts of ineffective assistance of counsel. (See Exhibit 'G' (Notice of Appeal); see also Exhibit 13 to the P&A in Support of Second Amended Petition; see also CT 310-311.) His admissions included a concession of the gravamen of Ground #7, that is the claim arising from his failure to search Susan Kurtz's wallet before it went into evidence.

Trial counsel was an experienced local practitioner with a good reputation. But, as this Court can learn through a review of Ground 4 of the habeas petition (see Exhibit 'B' (2nd Amended Petition), pp. 13-14), he represented appellant/petitioner during a time of personal crisis. He had recently been through a divorce. It was at a time when trial counsel's long-standing alcoholism repeatedly put him into conflict with the law. Indeed, shortly after the trial, he had an alcohol induced, near fatal, accident. That accident gave rise to criminal charges. (See Exhibit 'H' (Declaration of William DiVita).)

Nevertheless, appellant/petitioner's trial attorney honorably confessed to the inadequacy of his representation. (Exhibit 'G' (Notice of Appeal).) Owing to that admission, arguably, the District Court improperly applied the normal presumption in favor of an attorney's "tactical" decisions to the case. Counsel's confessions of his professional negligence put all of appellant/petitioner's ineffective assistance of counsel claims in a different light.

Through Grounds 5, 6, and 8, appellant/petitioner demonstrated that trial counsel failed to present evidence which would have marginalized the State's motive theory, rebutted the State's theory regarding Susan Kurtz's mental state at the time of the crime, and bypassed an

obviously beneficial instruction relating provocation to the degrees of murder. (See Exhibit 'C' (Objection), pp. 38-78.) Quite likely, these truly were oversights. Quite likely, given his admissions of incompetent representation, if an evidentiary hearing was held on these claims, trial counsel would admit as much.

A

THE ISSUE OF PREJUDICE WITH RESPECT TO GROUNDS 5 THROUGH 8 OF THE HABEAS PETITION IS ALSO DEBATABLE

As any court would admit, prejudice analysis is more art than science. While it is shaped by experience and stare decisis, it is more on the order of a doctor's diagnosis than a matter of pure definitive logic.

While there are cases for which the prejudice analysis is incontestable – for example, cases with multiple eyewitnesses, a confession, and forensic evidence – this is not such a case. There was no direct evidence of premeditation and deliberation and the road to that mens rea was paved with available, but hardly ineluctable, inferences.

It is on the level of those "inferences" that the standard of review for ineffective assistance of counsel claims meshes with the case. In that respect, appellant/petitioner asks this Court to recognize that the express terminology of the lower court's Report & Recommendation with respect to Grounds 5 through 7 raises a colorable issue as to the appropriateness of the standard of review applied to appellant/petitioner's ineffective assistance of counsel

claims. (See Exhibit 'A' (R&R) pp. 27-35.) Some excerpts from the Report and Recommendation[7] will bring appellant/petitioner's point into focus.

"EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #5

> The prosecution's theory *could* reasonably be interpreted by the jury as calling into question Petitioner's ability to handle another failure, the loss of his business a second time to a wife who could no longer put up with his drug addiction. (Exhibit 'A' (R&R) p. 28(22-26).)
>
> There was also more at stake than just the business. There was the *possibility* that Petitioner could lose custody of his son. Thus, even if Trial Counsel had presented evidence of Petitioner's alleged financial independence, the jury *could still* find the prosecution's motive theory credible. As Petitioner has failed to show prejudice, this claim must fail. (*Id.*, at p. 29(1-5).) (emphasis added)

EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #6

> Even if the jury believed every word of Petitioner's testimony regarding his wife's anger, they *could still* have found him guilty of first degree murder. . . . The jury *could* reasonably have found that holding a computer cord around someone's head or neck is highly likely to lead to

[7] See Exhibit 'A' (R&R).

> strangulation and death. Additionally, the jury *could still* have determined that during the struggle Petitioner had the opportunity consciously to choose between walking or running away from the house and his upset wife or killing her. They *could* reasonably have found that Petitioner's actions following the murder were evidence of his consciousness of guilt. Finally, they *could* have found that Petitioner, based on his lies to family, friends, and police officers, was not a credible witness and therefore did not believe that this was an accident. (Exhibit 'A' (R&R) pp. 31(24)-32(12.) (emphasis added)

EXCERPTS FROM THE
MAGISTRATE JUDGE'S PREJUDICE
ANALYSIS FOR GROUND #7

> Therefore, [Petitioner] concludes, the jury *must have* interpreted this receipt to mean that Susan knew of Petitioner's infidelities, and that destroyed his credibility which led them to convict. . . . The jury therefore *did not need to infer* that she knew of his contact with prostitutes. . . . The jury *could* therefore have determined that based on her suspicions she decided to get tested. . . . Thus, exposure of the jury to this extrinsic evidence *did not necessarily* incriminate Petitioner or unduly influence their determination of guilt or innocence. [ ] As discussed previously, even if the jury believed Petitioner's testimony that he was only responding in kind to his wife's rage, the jury *could* still have found him guilty. (Exhibit 'A' (R&R) pp. 34(20)-35(7).) (emphasis added)"

The problem with the analysis of these claims is best illustrated by a recent Supreme Court case. The United States Supreme Court in *Schlup v. Delo* (1995) 513 U.S.

298, 330, 130 L.Ed.2d 808, 115 S.Ct. 851, ('*Schlup*'), compared the "probabilistic" standard of review of *Murray v. Carrier* (1986) 476 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct, 2639. ('*Carrier*'), with the federal standard for sufficiency of evidence claims under *Jackson v. Virginia* (1979) 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, ('*Jackson*'). The Court's remarks are pertinent to this Motion for a Certificate of Appealability because, the *Carrier* standard and the *Strickland* standard are both "probabilistic standards" – as the *Schlup* Court defined that term – while the *Jackson* standard is sui generis. As the *Schlup* Court explained:

> The *Jackson* standard, which focuses on whether any rational juror *could have* convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. . . . Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*, the use of the word *could* focuses the inquiry on the power of the trier of fact to reach its conclusion. Under *Carrier*, the use of the word "*would*" focuses the inquiry on the likely behavior of the trier of fact.
>
> Indeed, our adoption of the phrase 'more likely than not' reflects this distinction. Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact *are likely to do*. Under this *probabilistic* inquiry, it makes sense to have

> a *probabilistic* standard such as 'more likely than not'.
>
> The 'clear and convincing' standard adopted in *Sawyer* reflects this same understanding. Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of Petitioner's claim, that is not true under *Carrier*.

(*Schlup*, supra, at 513 U.S. 330, fn. 49, 130 L.Ed.2d 838.) (emphasis added)

Thus, if a Court conducts prejudice analysis for a federal claim that is governed by a "probabilistic standard" in terms of whether, despite the claimed error, the jury *could* still have convicted, that Court is engaged in the wrong inquiry. *Strickland v. Washington* sets a "probabilistic standard" for ineffective counsel claims, that is, one that focuses on what reasonable jurors *would* do – not what reasonable jurors *could* do. From *Strickland* we have:

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> The defendant must show that there is a reasonable *probability* that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different. A reasonable *probability* is a *probability* sufficient to undermine confidence in the outcome.

(*Strickland*, supra, at 466 U.S. 694.) (emphasis added)

In fact, seen through the lens of *Strickland*, the passages in which this District Court performed prejudice analysis for Grounds 5 through 7 have a favorable aspect. They certainly do not exclude the possibility that a different result might have occurred in the absence of counsel's errors and oversights. They merely say that even without such lapses, the jury "could still have" convicted.

Thus, appellant/petitioner asks this Court to give him leave to appeal the lower court's prejudice findings. "Reasonable jurists" might well be inclined to debate the resolution of these ineffective assistance of counsel claims. As this Court is aware, jurists frequently disagree as to what constitutes ineffective assistance of counsel.

III

ISSUES SIMILAR TO APPELLANT/PETITIONER'S INEFFECTIVE ASSISTANCE CLAIMS WERE RESOLVED FAVORABLY TO HABEAS PETITIONS BY OTHER FEDERAL COURTS

A recognized basis for the grant of a certificate of appealability is that a similar issue led to relief in another forum. (*Lozada v. Deeds* (1991) 498 U.S. 430, 431-432, 112 L.Ed.2d 956, 111 S.Ct. 860, 861-862 (per curiam); *Guti v. U.S. I.N.S.* (9th Cir. 1990) 908 F.2d 495, 496; Vol. #2, Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (4th Ed. 2001) § 35.4c, fn. 74 & related text, p. 1592.)

Measured against this criterion, Grounds 1 to 3[8], Ground 5[9], Ground 6[10], Ground 8[11], and all of the grounds when considered cumulatively[12], must be favorably considered for certification on appeal.

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[8] See supra, p. 8 [citing cases].

[9] *Gonzales v. McKune* (10th Cir. 2001) 247 F.3d 1066, 1073 [the court found that trial counsel's failure to object to motive evidence as hearsay fell below the objective standard of reasonableness and satisfied the first prong of *Strickland*]; see also *Ward v. U.S.*, (6th Cir. 1993) 995 F.2d 1317, 1321-1322; *Crotts v. Smith* (9th Cir. 1996) 73 F.3d 861, 866.

[10] Cf. *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057. The focal point of *DePetris* was a handwritten journal kept by the victim, Dana DePetris. It was a chilling account of his savagery towards his wife, Kelly, and others. The issue in the case was whether the exclusion of all reference to the journal at trial prejudiced his wife's defense. Kelly testified that, on the morning that she killed Dana, she believed that either she would kill him or he would kill her and her baby. The journal played a key role in her state of mind. Appellant/petitioner submits that the prejudice analysis in *DePetris* bears upon the propriety of issuing a certificate of appealability on Ground 6 since both appellant/petitioner's case and *DePetris* are cases in which crucial evidence of the mental state of the victim was not placed before the jury. In each case the journals of the victims were sui generis, no other direct evidence of the victim's state of mind was available. (*Id.* at 1062-1065.)

[11] Cf. *U.S. ex rel. Barnard v. Lane* (7th Cir. 1987) 819 F.2d 798, 802-805 [attorney who stakes client's fate on "all or nothing" strategy held to be ipso facto incompetent – see discussion at Exhibit 'C' (Objection), pp. 75(26) to 77(6)].; *Capps v. Sullivan* (10th Cir. 1990) 921 F.2d 260, 262 [ineffective assistance of counsel to hope that the jury will "ignore the court's instructions and acquit from sympathy, rather than to raise an entrapment defense that has some support in the evidence"].

[12] *Harris by and through Ram Sayer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [reversing for ineffective assistance of counsel under a cumulative error standard]; *Lindstadt v. Keane* (2nd Cir. 2001) 239 F.3d 191, 204-205 [cumulative effect of four ineffective assistance of

(Continued on following page)

IV

THE PROPRIETY OF DECIDING APPELLANT/PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING IS DEBATABLE

In appellant/petitioner's traverse, at pages 29 through 60, he carefully identified the factual issues bearing on Grounds 1 through 3 which needed to be resolved by the District Court. These factual issues included, inter alia: (1) "[t]he nature of trial counsel's consultation, if any, with [appellant/petitioner] regarding the attorney-client privilege"; (2) the extent to which "trial counsel was authorized by [appellant/petitioner] to disclose or elicit the disclosure of confidential information from witnesses"; (3) the question of whether the police would have "inevitably discovered the body" even without the attorney/client disclosure; (4) the factual question of whether "any of the confidential information . . . [would have been] disclosed to the jury if trial counsel had not seen to it"; (5) the issue of whether "trial counsel's unauthorized conduct impair[ed] the attorney/ client relationship"; (6) the question of whether "petitioner would have refused to allow trial counsel to make or solicit the disclosures" if he had been consulted; and several other issues which are mixed questions of law and fact. In addition, Grounds 4 and 5 would benefit from factual development. (See Exhibit 'C' (Objection), pp. 35-53.)

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counsel claims]; *Stouffer v. Reynolds* (10th Cir. 2000) 214 F.3d 1231, 1232-1235 [cumulative ineffective assistance of counsel error].

As this Court knows, the Ninth Circuit has frequently reversed for failure to subject qualifying claims to an evidentiary hearing. (See *U.S. v. Chacon-Palomares* (9th Cir. 2000) 208 F.3d 1157, 1159-1160; *Hendricks v. Vasquez* (9th Cir. 1992) 974 F.2d 1099, 1109-1110 [district court errs in failing to hold evidentiary hearing on ineffective assistance of counsel claim]; *Chacon v. Wood* (9th Cir. 1994) 36 F.3d 1459, 1465 [district court errs in failing to hold evidentiary hearing on ineffective assistance of counsel claim]; *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1027 [reversed and remanded for evidentiary hearing on ineffective assistance of counsel claim]; *U.S. v. Larsen* (9th Cir. 9/4/2002) 2002 D.A.R. 10135, 2002 D.O.S. 8075, 8077 [reversing and remanding for an evidentiary hearing to determine whether defendant knowingly and intelligently waived crucial rights].)

CONCLUSION

In *People v. Coddington* (2000) 23 Cal.4th 529, 97 C.R.2d 528, the California Supreme Court confronted a particularly grisly set of facts. Two young girls were raped and, their chaperones (two seventy year-old women) were strangled to death by means of "FLEX-CUF" ligatures – a type of self-locking plastic restraint used by law enforcement on human subjects. The "FLEX-CUP" design is such that they must be cut to be removed. The evidence in that case of premeditation and deliberation dwarfs, by any measure, that in the case at bar.[13]

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[13] Coddington was heard reading aloud from a book describing the use of such ligatures to kill; was in possession of an invoice stating that

(Continued on following page)

Nevertheless, the California Supreme Court asserted that "a properly instructed jury could have returned second degree murder verdicts if the jury found that [Coddington] acted in a panic and pulled the FLEX-CUFs tight only to overcome the victim's resistance and stop the noise". (*Id.* at 592.)

If on the facts of *People v. Coddington*, supra, a court can find the level of the defendant's guilt contestable, and such a scenario tenable, then it should be a foregone conclusion that appellant/petitioner's conviction for the **first-degree** murder of Susan Kurtz could have been impacted by trial counsel's many errors and omissions. In his testimony, appellant/petitioner claimed to have strangled Susan Kurtz inadvertently, in an effort to blunt her violent attack upon him, and owing to the shock and confusion occasioned by it.[14] However unlike the facts in Coddington, there was scant evidence in appellant/petitioner's case of premeditation or deliberation and no percipient witnesses to the crime. Unlike the facts in *Coddington*, only one person was killed. Unlike the facts in *Coddington*, the State's motive theory was purely speculative. Unlike the facts in *Coddington*, there was

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FLEX-CUFs could not be released once cinched; and he left behind a variety of writings which made clear that he foresaw having to dispose of the bodies of his victims. (*People v. Coddington*, supra, at 23 Cal.4th 549-550.) In addition, the State had percipient evidence of the way in which the killings occurred – evidence which was almost irreconcilable with anything other than first-degree murder. (*Id.* at 550-556.

[14] See RT 561-565, 610-612, 619.

plausible evidence from which to infer that in appellant/petitioner's case the victim provoked the violence.[15]

Justice and the *Barefoot v. Estelle* standard require the issuance of a certificate of appealability in this case.

Dated: October 21, 2002

Respectfully Submitted,
/s/ William E. Gilg
WILLIAM E. GILG,
Attorney for Appellant/
Petitioner

[15] Appellant/Petitioner was injured during the fight with his wife. The next day he was seen with a sizeable bite mark on his hand and was walking with a noticeable limp. Susan Kurtz outweighed appellant/petitioner by 100 pounds at the time of her death. (See Exhibit 'C' (Objection) pp. 51(5)-53(9).)

APPENDIX R

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ROBERT M. KURTZ, Appellant/Petitioner, and ROBERT AYERS, WARDEN Appellee/Respondent.	) Case No.: 02-16843) Dist Ct No.) CV F-97-06201 AWI)) PETITION FOR) REHEARING;) SUGGESTION FOR) REHEARING EN BANC)) [Circuit Rule 35-1])) (Filed Apr. 1, 2003)

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TO THE HONORABLE JUDGES OF THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT:

Petitioner Robert M. Kurtz petitions this Honorable Court for rehearing, or rehearing en banc, based on the following.

The denial of the COA on the attorney/client privilege (ACP) conflicts with a prior decision of this Circuit in which it was presumed that unauthorized disclosures of ACTI material were a violation of a defense attorney's core responsibilities. (See *U.S. v. Alexander* (9th Cir. 2002) 287 F.3d 811, 816-817, 821.) Additionally, the U.S. Supreme Court in *Nix v. Whiteside* (1986) 475 U.S. 157, 165-166, 89 L.Ed.2d 123, 106 S.Ct. 988, recognized that there was a need "in some future case" to define the weight to be given to ethical cannons, statutes and professional codes, and the Sixth Amendment in defining the proper scope and limits on an attorney's conduct regarding ACP.

On March 18, 2003, this Court affirmed the judgment of the District Court denying a certificate of appealability ("COA") in this case. The termination without appeal of this case is an exceptionally blatant violation of the spirit and letter of *Slack v. McDaniel*[1], which liberally safeguards the right of appeal for anyone posing a colorable

---

[1] *Slack v. McDaniel* (2000) 529 U.S. 473, 481-484, 146 L.Ed.2d 542, 120 S.Ct. 1595 [28 U.S.C. { 2253(c)codifies the *Barefoot v. Estelle* standard]; *Barefoot v. Estelle* (1983) 463 U.S. 880, 893 & fn. 4, 77 L.Ed.2d 1090, 103 S.Ct. 3383, 3394 & fn. 4; *Miller-El v. Cockrell* (2003) 2003 D.A.R. 1991, 1996 (U.S. Supreme Court (2/25/03) No. 01-7662) [the deferential standard of 28 U.S.C. { 2254(d &e) does not bear on the separate consideration of whether an appeal under 28 U.S.C. { 2253 should be allowed].

factual or legal question. Petitioner will make his point through eight independent lines of analysis.

First, a COA must issue in this case, lest the attorney/client privilege ("ACP") be irreparable damaged. The District Court concluded that material, unauthorized, disclosure of inculpatory client communication by a defense attorney do not constitute conduct falling beneath prevailing norms of professional conduct.[2] Petitioner sought a COA on this issue, citing the United States Supreme Court for the proposition that the ACP is central to the "proper functioning of our adversary system of justice" and the Sixth Amendment guarantee of assistance of counsel.[3] This Court, by denying a COA, has expressly sanctioned the idea that material, inculpatory, privileged communications can be divulged by an attorney without

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[2] See the District Court's Report & Recommendation (R&R) at Exhibit 'A' to Petitioner's Motion for a COA filed with this Court, page 13(8-11) [material, unauthorized, disclosures of inculpatory client communications by a defense attorney do not constitute "prima facie evidence of unreasonable or incompetent assistance of counsel"].

[3] The ACP privilege is central . . . "to the proper functioning of our adversay system of justice." (*U.S. v. Zolin* (1989) 491 U.S. 554, 562, 105 L.Ed.2d 469, 109 S.Ct. 2619, 2626.) Respect of the privilege is vital "if the professional mission is to be carried out." (*Upjohn v. U.S.* (1981) 449 U.S. 383, 389, 66 L.Ed.2d 584, 101 S.Ct.677, 682.) The "sound[ness] [of] legal advice. . . . depends upon the lawyer being fully informed by the client." (*Ibid.*) "If the client knows that damaging information could more readily be obtained from the attorney. . . . [a] client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." (*Fischer v. United States* (1976) 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569, 1577.) The "Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented **only** if a criminal defendant knows that his communications with his attorney are private . . . " (emphasis added) (*Weatherford v. Bursey* (1977) 429 U.S. 545, 554 fn. 4, 51 L.Ed.2d 30, 97 S.Ct. 837.)

consultation with his client, and that a reviewing court will not even inquire into the trial attorney's motivation in such disclosures.[4] This remarkable revision of the theory underlying the ACP should not pass into the record of the Ninth Circuit without rehearing en banc.

Second, the denial of a COA on the ACP issue, conflicts with decisions of this Circuit in which it was presumed that unauthorized disclosures of ACP material were a violation of a defense attorney's core responsibilities. (See e.g., *U.S. v. Alexander* (9th Cir. 2002) 287 F.3d 811, 816-817, 821.)

Third, in *Nix v. Whiteside* (1986) 475 U.S. 157, 165-166, 89 L.Ed.2d 123, 134, 106 S.Ct. 988, the United States Supreme Court has recognized that there is a need, "in some future case", "to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on [a trial attorney's conduct]."[5]

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[4] See generally petitioner's Objections to R&R at Exhibit 'C' to petitioner Motion for a COA filed with this Court, pages 1 to 35 (discussing Grounds 1 to 3), and compare the Report and Recommendation (Exhibit 'A' to the Motion for a COA), pages 11(20)-25(22) [deciding Grounds 1 to 3 based upon speculation regarding defense counsel's motives].

[5] See California Business and Professions Code section 6068(e); California Evidence Code sections 912(a), 953-955; ABA Ethical Cannon 4; ABA Ethical Consideration, EC 4-4; ABA Compendium of Professional Responsibility Rules and Standards, DR 4-101; Model Rules of Professional Conduct (1998) section 1.6; *see also*, Exhibit 'C' to Petitioner's Motion for a CA (i.e. petitioner' objection to the Report and Recommendation) at Exhibit 1, pages 2-4 and Exhibit 3, pages 4-7.

The District Court did not dispute that petitioner's trial attorney violated several cannons of his profession, as well as black letter law, in making unauthorized divulgence of the location of Susan Kurtz's body.[6] Given the violations of those cannons and statutes, and given the substance of the passage just quoted form *Nix v. Whiteside*, a COA simply had to be issued.[7] How can the issue be undeserving of briefing at the level of this Court when the U.S. Supreme Court has opined that when squarely presented, it will be worthy of its attention?

The ACP issue was pivotal in the resolution of Grounds 1 to 3 of petitioner's federal habeas petition. However, the unjust denial of a COA on those three grounds is not the only reason to order rehearing.

The fourth reasons for the issuance of a COA is that the District Court's harmless error analysis was directly contrary to Ninth Circuit and United States Supreme Court precedent. In presenting its prejudice analysis for Grounds 5 to 7 (all claims of ineffective assistance of counsel)[8] the District Court failed to determine whether there was a "reasonable probability of a different outcome." Instead, the District Court asked whether, but for trial counsel's errors, the jury "could still have" found petitioner guilty. Finding that it "could", the District Court decided petitioner had not proven prejudice. In all, the

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[6] See Exhibit 'A' (**R&R**) to Petitioner's Motion for a COA filed with this Court, pages 11(20)-25(22).

[7] *Nix v. Whiteside* (1986) 475 U.S. 157, 165-166, 89 L.Ed.2d 123, 134, 106 S.Ct. 988.

[8] The federal petition is Exhibit 'B' to petitioner's Motion for a COA.

District Court applied this linguistic formula on nine occasions in denying Grounds 5 to 7.[9] The following excerpts from the R&R will bring petitioner's point into focus:

> *"EXCERPTS FROM THE MAGISTRATE JUDGES PREJUDICE ANALYSIS FOR GROUND #5*
>
> The prosecution's theory *could* reasonably be interpreted by the jury as calling into question Petitioner's ability to handle another failure, the loss of his business a second time to a wife who could no longer put up with his drug addiction. (Exhibit 'A' (R&R) p. 28(22-26).)
>
> There was also more at stake than just the business. There was the *possibility* that Petitioner could lose custody of his son. Thus, even if Trial Counsel had presented evidence of Petitioner's alleged financial independence, the jury *could still* find the prosecution's motive theory credible. As Petitioner has failed to show prejudice, this claim must fail. (*Id.*, at p. 29(1-5).) (emphasis added)
>
> *EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #6*
>
> Even if the jury believed every word of Petitioner's testimony regarding his wife's anger, they *could still* have found him guilty of first degree murder. . . . The jury *could* reasonably have found that holding a computer cord around someone's head or neck is highly likely to lead to strangulation and death. Additionally, the jury

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[9] See petitioner's Motion for COA at pages 14 to 15.

could still have determined that during the struggle Petitioner had the opportunity consciously to choose between walking or running away from the house and his upset wife or killing her. They *could* reasonably have found that Petitioner's actions following the murder were evidence of his consciousness of guilt. Finally, they *could* have found that Petitioner, based on his lies to family, friends, and police officers, was not a credible witness and therefore did not believe that this was an accident.

(Exhibit 'A' (R&R) pp. 31(24)-32(12.) (emphasis added)

EXCERPTS FROM THE MAGISTRATE JUDGE'S PREJUDICE ANALYSIS FOR GROUND #7

Therefore, [Petitioner] concludes, the jury *must have* interpreted this receipt to mean that Susan knew of Petitioner's infidelities, and that destroyed his credibility which led them to convict. . . . The jury therefore *did not need to infer* that she *knew* of his contact with prostitutes. . . . The jury *could* therefore have determined that based on her suspicions she decided to get tested. . . . Thus, exposure of the jury to this extrinsic evidence *did not necessarily* incriminate Petitioner or unduly influence their determination of guilt or innocence. [ ] As discussed previously, even if the jury believed Petitioner's testimony that he was only responding in kind to his wife's rage, the jury *could* still have found him guilty.

(Exhibit 'A' (R&R) pp. 34(20)-35(7).) (emphasis added)"

(See footnote 9.)

If this Court allows this case to end without appellate briefing, it will have sanctioned the resolution of three ineffective counsel claims under the *Jackson v. Virginia*, insufficiency of the evidence standard, rather than the *Strickland v. Washington* standard, which obviously governs the question, and it will have broken with its own precedent.[10]

Fifth, the issuance of a COA on Ground 5 of the petition was a logical imperative. In Ground 5, petitioner alleged that his trial attorney was ineffective for "failing to present obvious, readily available evidence negating the people's motive theory". Petitioner's theory of prejudice for Ground 5 was that the California Court of Appeal had made a factual determination that the State's motive theory was the most powerful evidence supporting the prosecution's theory of **premeditated, deliberate, first**-degree murder. Given the deference owed to this factual determination under 28 U.S.C. section 2254(d)(2), petitioner reasoned that evidence showing that trial counsel

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[10] See *Schlup v. Delo* (1995) 513 U.S. 298, 330 & fn. 49, 130 L.Ed.2d 808, 115 S.Ct. 851 [contrasting "probabilistic standards" (like *Strickland's*) with the *Jackson v. Virginia* standard and noting that the latter focuses on whether a jury "could" legally convict]; *Viscotti v. Woodford* (9th Cir. 2002) 288 F.3d 1097, 1108 [reversed on other grounds in *Woodford v. Visciotti* (2002) 123 S.Ct. 357 ["A 'reasonable probability' is *less than* a preponderance: [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."] (emphasis added); *Strickland v. Washington* (1984) 466 U.S. 668, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052.

could have easily debunked that motive theory, carried his burden under *Strickland*.[11]

In denying Ground 5, the District Court ignored the California Court of Appeals fact findings on motive, and the theory of motive on which the case was tried, and concocted a new motive theory, one under which it believed the jury "could still have" convicted. Using this novel redefinition of the State's theory (and one not briefed by the parties), the District Court denied Ground 5. Moreover, even after petitioner filed an objection debunking the newly coined motive theory, the Magistrate's Report was adopted by District Court.[12] Thus, the resolution of Ground 5 was one of compounded error.

Sixth, the denial of Ground 6 must be deemed "debatable", at an understated minimum in light of the ratio decidendi of *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057. In Ground 6, petitioner alleged that trial counsel was ineffective for failing to present entries from Susan Kurtz's diary demonstrating that an avalanche of anger was pent-up inside her, just waiting to be loosed on petitioner if he proved to be unfaithful. This failure was important because that evidence would have done two things: corroborate petitioner's testimony (i.e. that Susan attacked him); and, flatly contradicted the State's portrayal of Susan as a meek and passive (240 lb) woman that would never have lost her temper, let alone attacked (140 lb) petitioner in a rage over his infidelity.

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[11] See Exhibit 'C' (Objections to R&R) to petitioner's Motion for a COA, pages 38 to 54 [discussing Ground 5].

[12] See footnote 11.

The District Court denied relief upon an assessment of the relevant facts and law which could, modestly, be described as "debatable".[13] One extremely unreasonable aspect of the District Court's ruling on Ground 6 was that court's prejudice analysis. It reasoned that Susan's diary would not have proven petitioner's **complete** innocence and therefore did not satisfy *Strickland's*, standard of prejudice.[14] This was so unfair. Petitioner only argued that the diary would probably have neutralized the State's theory of **premeditated**, **first**-degree murder. Petitioner's consistent theory of prejudice for Grounds 5 through 7 was directed at the difference between first-degree and second-degree murder. The District Court never once took up prejudice analysis from that vantage point. It never accounted for the extent to which the diary would have supported petitioner's theory of provocation, and thereby diminished the State's theory of premeditation.

Nor can the District Court's rejection of Ground 6 be reconciled with *Depetris v. Kuykendall*, supra. Like *Depetris*, petitioner's case was one of domestic violence, from which only one party survived. Like *Depetris*, the jury's assessment of the state of mind of the spousal-combatants was crucial. Given that the **aggressor's** journal in *Depetris* was deemed crucial[15], how can the **victim's** journal be deemed so self evidently superfluous in this case?

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[13] "See Exhibit 'C' (Objections to R&R) to petitioner's Motion for a COA, pages 54 to 69 [discussing Ground 6].

[14] See Exhibit 'A' (R&R) to petitioner's Motion for a COA, pages 29(6)-32(15).

[15] The focus point of *DePetris* (9th Cir. 2001) 239 F.3d 1057, was a handwritten journal kept by the victim, Dana DePetris. It was a

(Continued on following page)

The prosecutor ridiculed petitioner's testimony describing Susan's rage at finding written proof of petitioner's infidelity.[16] The prosecutor reminded the jury of the extensive testimony from Susan's friends and relatives describing her as a meek, long-suffering, and passive, and intensely religious woman, who simply did not respond to cruel twists of fate in anger.[17] To say that Susan's diary, expressive of a veritable powder-keg of emotions concerning her husband, would not have materially effected the outcome of this case, is grievously – grievously – unfair. To say that Ground 6 does not pose a debatable question is to ignore that *DePetris* justified relief on closely analogous grounds.

Seventh, Ground 7 presented a truly compelling ground for reversal. The claim charged trial counsel as negligent for failing to search a wallet that went into evidence. Within the wallet was inadmissible hearsay which, out of its true context, undercut petitioner's

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chilling account of his savagery towards his wife, Kelly, and others. The issue in the case was whether the exclusion of all reference to the journal at trial prejudiced his wife's defense. Kelly testified that, on the morning that she killed Dana, she believed that either she would kill him or he would kill her and her baby. The journal played a key role in documenting her state of mind. Petitioner submits that the prejudice analysis in *DePetris* bears upon the propriety of issuing a certificate of appealability on Ground 6 since both petitioner's case and *DePetris* are cases in which crucial evidence of the mental state of a spousal-combatant was not placed before the jury. In each case the journals were sui generis, no other direct evidence of the state of mind of that person was available. (*Id.* at 1062-1065.)

[16] See Exhibit 'C' to petitioner's Motion for a COA, pages 57(8) to 60(12) [this is petitioner's Objection to the R&R, it discusses the prosecutor's relevant evidence and argument].

[17] *Ibid.*

credibility. Trial counsel conceded that his failure to search the wallet was ineffective. The District Court took issue with the claim saying that the error was not sufficiently prejudicial. Petitioner pointed out that he had declarations from two jurors saying that the document in question was pivotal in their deliberations. Even accepting the fact that such declarations are inadmissible on grounds of public policy[18], the content of the declarations is evidence that the rejection of petitioner's theory of prejudice was unreasonable. After all, the declarations are the best evidence imaginable on the role of the wrongfully admitted evidence in the verdicts. The District Court's reasoning flies in the face of the truth. It was pure verbal sorcery.

Finally, with respect to Ground 8, the lower court's denial is inconsistent with the Seventh Circuit's holding in *U.S. v. ex rel. Barnard v. Lane* (7th Cir. 1987) 819 F.2d 798, 802-805. Ground 8 alleged that trial counsel was ineffective for failing to request CALJIC No. 8.73, relating to evidence of provocation to the degree of murder. The District Court, relying on the ruling of the Court of Appeal, found that trial counsel could have bypassed the instruction intending to force the jury into a choice between first-degree murder and manslaughter. Petitioner cited *U.S. v. ex rel. Barnand v. Lane*, supra, for the proposition that such a tactic would be indefensible under *Strickland*. Secondly, petitioner pointed out that trial counsel had never been asked what his reason was and that the whole notion of forcing the jury into an "all or nothing" choice

[18] See petitioner's Objection to the R&R (Exhibit 'C' to the Motion for COA), at pages 70-74(2) [discussing Ground 7 and the jury declarations mentioned in the text].)

was concocted out of whole cloth. Third, petitioner pointed out that the tacit assumption behind the lower court's tactical explanation for the conduct was that trial counsel could reasonably bank on jury nullification. The underlying premise was that trial counsel could *rationally commit* to a strategy based upon forcing a jury that was convinced that this murder (i.e., an intentional killing that occurred without "heat of passion"), to nonetheless find it to be manslaughter, merely because they though the penalty of first-degree murder would be too stiff. In short, the attributed tactical justification presupposes that the jury would be disposed to act on sympathy for the defendant rather than on their instructions. (See *Capps v. Sullivan* (10th Cir. 1990) 921 F.2d 260, 262 [IAC to hope the jury will "ignore the court's instructions and acquit from sympathy, rather than to raise an entrapment defense that has some support in the evidence"].

CONCLUSION

As to Grounds 1 through 8, petitioner incontrovertibly deserves a COA. In *Miller-El v. Cockrell*[19], the United States Supreme Court upbraided the Fifth Circuit for ignoring the permissive standard governing COA applications. Title 28 of the United States Code, section 2253 is not supposed to be a means of containing federal habeas petitions at the level of the District Court. Nor, is it intended to make final the debatable opinions of a District Court. (*Ibid.*) Rather, it is intended to be a mechanism to

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[19] *Miller-El v. Cockrell* (U.S. Supreme Court, No. 01-7662; 2/25/03) 2003 D.A.R. 1991.

summarily terminate truly frivolous appeals.[20] By no stretch of the imagination was petitioner's appeal, or petition, frivolous. He deserves far more than a COA, he deserves relief on the merits. The rubber-stamp saying "denied" must be set aside. The right of appeal must be meaningfully, and liberally, afforded. Due respect is owed to the venerable ACS and its crucial role in the vindication of the Sixth Amendment. Trial counsel actually admitted that he was ineffective on three grounds.[21] The idea that petitioner has frivolously challenged his competence is itself frivolous. This case is manifestly worthy of rehearing.

April 1, 2003 Respectfully Submitted,

/s/ William E. Gilg
WILLIAM E. GILG,
Attorney for Petitioner

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[20] See *Miller-El*, supra, at 1995: "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere 'good faith' on his or her part. *Barefoot*, supra, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." See also, Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure* (4th. Ed. 2001) { 35.4c, pages 1590-1592.

[21] In petitioner's notice of appeal filed with the trial court his trial counsel listed three issues of IAC: failing to file a motion for change of venue; neglecting to search Susan's wallet which contained damaging evidesnce; and failing to file a motion in limine to prevent the introduction of petitioner's Alcoholics Anonymous Fourth Step from being introduced into evidence, and failing to object to its introduction into evidence.

APPENDIX S

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April 14, 2003

Clerk, Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Kurtz v. Ayers, No. 02-16843*
(pending on Petition for Rehearing)

Citation to Supplemental Authorities

(Filed Apr. 15, 2003)

(F.R.A.P. Rule 28(j))

Dear Sir or Madam:

Pursuant to Rule 28(j) of the F.R.A.P., I bring to the Court's attention the recent decision in *McClure v. Thompson* (9th Cir. 4/2/03 – No. 01-35593) ___ F.3d. ___, 2003 Daily Journal (D.A.R.) 3645.

The *McClure* decision is **the very first time** any federal court has addressed whether a defense attorney's unauthorized disclosure of the client-confided location of a murder victim's body constitutes a Sixth Amendment violation. Also, it is the first decision to address an issue expressly reserved by the U.S. Supreme Court, namely the weight to be given canons of ethics in defining the proper scope of a trial attorney's conduct. (*Nix v. Whiteside* (1986) 475 U.S. 157, 165-166, 89 L.Ed.2d 123, 106 S.Ct. 988.)

McClure comes in 'the nick of time', vindicating petitioner's position and contradicting the lower court on three core issues:

First, *McClure* holds that a material breach of the attorney-client privilege "makes out a deprivation of the Sixth Amendment right to counsel". (*McClure*, supra, at 3649.) In contrast, the lower court held that a violation of the privilege "is not prima facie evidence" of ineffective counsel. (See Exhibit 'A' to petitioner's motion for a COA, p. 13(7-11).)

Second, *McClure* holds that the privilege is only waived through "consent after consultation". (*Ibid.*) The lower court held that consultation was not an important factor. (*Id.* at p. 13, fn. 5, p. 17(19-26).)

Third, unlike *McClure*, no evidentiary hearing was held in petitioner's case, despite petitioner's submission of declarations from two witnesses to the breach. They proved that neither consent, nor consultation, occurred and that the attorney disclosed the body location flippantly to a detective who was an old crony of his. These declarations were uncontradicted.

Having varied from *McClure* in the three foundational matters above, the lower court's consequential denial of Grounds 1 to 3 is a mistake that needs to be corrected. Notably, unlike *McClure*, the breach in this case cannot be justified as an act intended to prevent a crime. Petitioner's victim was known by his counsel to be dead.

Rehearing is now required lest a split in this Court arise between this case and *McClure*. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 893, fn. 4, 77 L.Ed.2d 1090, 103 S.Ct. 3383.)

Thank you for your attention.

Sincerely,

/s/ Bill Gilg
BILL GILG,
Attorney for Petitioner